Nos. 38 and 39

In the Supreme Court of the United States

OCTOBER TERM, 1946

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DONNELLY GARMENT COMPANY, DONNELLY GARMENT WORKERS' UNION AND INTERNATIONAL LADIES' GARMENT WORKERS' UNION

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, PETITIONER

v.

DONNELLY GARMENT COMPANY, DONNELLY GARMENT WORKERS' UNION AND NATIONAL LABOR RELATIONS BOARD

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinions in the circuit court of appeals (XIII 7–64)[1] are reported in 151 F. 2d 854.

[1] The volume of the printed record, which contains the pleadings, the Board's decisions and orders, the petition to

Prior opinions of the circuit court of appeals in this case are reported in 7 L. R. R. M. 560 and in 123 F. 2d 215. The findings of fact, conclusions of law, and order of the National Labor Relations Board (A 618–622, X 3837–3898) are reported in 50 N. L. R. B. 241. A prior decision of the National Labor Relations Board in this case (A 552–617) is reported in 21 N. L. R. B. 164.

JURISDICTION

The decree of the circuit court of appeals was entered on October 29, 1945 (XIII 71). The petitions for writs of certiorari, in both Nos. 38 and 39,[2] were filed on January 29, 1946, and were granted on April 22, 1946 (XIII 73). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and upon Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. (a) Whether, when an employer expresses opposition to a nationally affiliated labor organization, through its supervisory staff sets up and thereafter takes a leading part in the adminis-

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review, and the answers, is referred to as "A," and the other volumes of the printed record are referred to by Roman and Arabic numbers indicating the volume and the page thereof.

[2] The petitions in both cases were directed to the same judgment of the court below. No. 38 was filed by the Board, the International Ladies' Garment Workers' Union being designated as a technical respondent; No. 39 was filed by the International Ladies' Garment Workers' Union, the Board being designated as a technical respondent.

tration of a plant union for the declared purpose of preventing the nationally affiliated labor organization from organizing its employees, and grants the plant union a closed shop agreement and financial and other support, the Board must give weight to testimony of employees that they freely formed and joined such plant union and knew of no interference with, domination or support of it by the employer, when deciding the question whether the employer has, in fact, interfered with, dominated, and supported the plant union in violation of Section 8 (2) of the National Labor Relations Act.

(b) Whether the trial examiner who presides at a hearing on remand for the purpose of receiving such employee testimony is biased and incapable of giving such testimony proper consideration merely because at the first hearing he expressed his opinion that such testimony was immaterial.

2. Whether the Board denied the employer and plant union due process of law in excluding the following evidence as immaterial to the issue of employer domination and support of a labor organization:

(a) Evidence as to whether contracts made by a nationally affiliated labor organization with other employers contain provisions as beneficial to employees as the provisions contained in a contract made by the employer with an alleged company-dominated labor organization;

(b) Evidence that employees at other plants having duties similar to those of the supervisory employees who were active in the formation and administration of the alleged company-dominated labor organization were eligible for membership in nationally affiliated labor organizations.

3. Whether the Board denied the employer and plant union due process of law in excluding evidence of misconduct of a nationally affiliated labor organization occurring at plants other than the employer's as immaterial to a determination by the Board of whether the employer has engaged in unfair labor practices and to a consideration of whether the Board should prosecute its complaint on charges filed by such nationaliy affiliated labor organization.

4. Whether the employer and plant union were denied due process of law by the Board's refusal to receive at a hearing on remand the following evidence which was not offered at the first hearing and was not alleged to be newly discovered or unavailable at the first hearing:

(a) Evidence, the materiality of which is questioned in 2 (b), *supra*, regarding the eligibility to membership in a nationally affiliated labor organization of employees at other plants having duties similar to those of the supervisory employees who were active in the formation and administration of an alleged company-dominated labor organization;

(b) Evidence of the non-discriminatory character of the discharges and lay-offs of certain employees prior to the passage of the Act, where all evidence on such subject offered by the employer at the original hearing was received and the Board made no finding as to whether the discharges and lay-offs were, in fact, discriminatory.

5. Whether there is substantial evidence in the record to support the Board's findings that the employer engaged in unfair labor practices within the meaning of Section 8 (1), (2), and (3) of the Act, and whether the Board's order is proper.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, pp. 108–110.

STATEMENT

I

PROCEEDINGS CULMINATING IN THE CIRCUIT COURT OF APPEALS' DECISION AND REMAND ORDER OF NOVEMBER 6, 1941

Upon charges and amended charges filed in 1938 and 1939 respectively, by International Ladies' Garment Workers' Union, herein called the I. L. G. W. U., the Board, on April 27, 1939, issued its complaint against Donnelly Garment Company, of Kansas City, Missouri, herein called the Company (A. 369–376, 553). The com-

plaint alleged that the Company had dominated and interfered with the formation and administration of a labor organization known as Donnelly Garment Workers' Union, herein called the D. G. W. U., and contributed financial and other support to it; had discharged two of its employees because they joined and assisted the I. L. G. W. U.; had, by these and other acts, coerced and restrained its employees from becoming or remaining members of the I. L. G. W. U. and had encouraged and compelled membership in the D. G. W. U.; and that by the aforesaid conduct, the Company had violated Section 8 (1), (2), and (3) of the National Labor Relations Act (A 369–374).

A hearing upon the complaint was held before a trial examiner of the Board from June 5 to July 15, 1939 (A 555). At that hearing, the trial examiner refused to permit the Company and the D. G. W. U. to call to the witness stand 1,200 employees of the Company who the Company alleged would each testify that he had joined the D. G. W. U. of his own free will, that the employees had voluntarily formed the D. G. W. U., and that such union was at all times free from employer influence, domination and support; the trial examiner did receive such testimony from 9 employees and admitted excerpts from the record in another case containing such testimony from 12 other witnesses (I 193–194, 214–215; II 609, 612–626, 651–653, 655, 660–661, 664, 669, 704, 704e, 704p–707, 718a–718e, 718r, 718s; IV 1223, 1226,

1228–1229, 1234, 1336v, 1336ee, 1336ii, 1336pp, 1336ccc, 1336ooo, 1336xxx, 1336eeee; VI 1752–1753). The trial examiner also excluded evidence that the I. L. G. W. U., before, and at the time of the formation of the D. G. W. U., had conspired to force the Company to sign a closed-shop contract with it by threatening to call a strike and to engage in conduct at the Company's plant in Kansas City similar to its conduct at other garment factories in Kansas City where pickets engaged in acts of violence and forcibly prevented employees from going to work (II 626–627, 660–661, 705; III 758; VI 1752–1753). Also excluded was evidence relating to labor agreements made by the I. L. G. W. U. with other employers (discussed *infra*, pp. 92–96), and other evidence (I 208–212, 220–221, 238i–238j, 243; VI 1924–1928, 1930–1931), not material to the issues presented by the petitions for writs of certiorari. On March 6, 1940, the Board issued its decision, in which it upheld the trial examiner in excluding all such evidence and in rejecting offers of proof as to some of it, and found that the Company had engaged in unfair labor practices in violation of Section 8 (1), (2), and (3) of the Act, substantially as alleged in the complaint (A 552–615). It issued the usual cease and desist and affirmative relief order for violations of this kind (A 615–647).

Thereafter, the Company and the D. G. W. U. filed separate petitions in the court below to

review and set aside the Board's order; and the Board filed its answer and petition for enforcement (XIII 4). During the pendency of these petitions, the Company and the D. G. W. U. filed with the court below applications for leave to adduce (1) evidence to show that they had been denied due process because of bias and prejudice on the part of the Board and its subordinates and collusion by them with the I. L. G. W. U., and (2) evidence mentioned *supra*, pp. 6–7, allegedly going to the merits of the case, which had been excluded by the trial examiner and which they contended was competent and material. On November 7, 1940, after oral argument on the applications, the court below handed down its opinion (7 L. R. R. M. 560), one judge dissenting, holding that the showing made by the Company and the D. G. W. U. as to the alleged bias and collusion was insufficient to invoke any action of the court, and denying the applications in that regard. It also denied the applications to adduce the excluded evidence allegedly going to the merits of the case but did so without prejudice to a renewal of such applications when the case should be finally submitted to the court (see 123 F. 2d 215, 219–220).

On November 6, 1941, the court below handed down its decision denying enforcement of the Board's order and remanding the case to the Board for further proceedings (123 F. 2d 215).

The court below ruled (123 F. 2d at 222–225) that the statements and rulings of the trial examiner, although in some respects erroneous, did not establish that he was biased, that the trial examiner and the Board had properly confined the issues to those tendered in the complaint by refusing to try the I. L. G. W. U. for the alleged conspiracy, but had denied the Company and the D. G. W. U. due process by excluding the evidence of employees, in accordance with an offer of proof, that they formed and joined the D. G. W. U. of their own free will and did not know of any interference with, domination or support of the D. G. W. U. by the Company. The court required the Board to vacate its findings, conclusions and order and to accord the Company and the D. G. W. U. "an opportunity to introduce all of the competent and material evidence which was rejected by the Trial Examiner; and to receive and consider such evidence together with all other competent and material evidence in the record before making new findings and a new order" (*id.* at 225).

II

BOARD PROCEEDINGS AND FINDINGS SUBSEQUENT TO THE REMAND ORDER

Pursuant to the court's mandate, the Board vacated its findings, conclusions and order of March 6, 1940, and directed a further hearing for

the purpose of taking additional evidence in accordance with the opinion of the court below (X 3785–3786). The same trial examiner who presided at the previous hearing again presided (I 1, VII 2057).[4] He received the testimony of 11 of the 1,200 employees named in the offer of proof that they had voluntarily formed the D. G. W. U., that they had joined it of their own free will, and that they knew of no interference with, domination or support of such union by the Company (VIII 2588, 2599–2600, 2631–2632, 2722–2723, 2772, 2858–2859, 2914–2915, IX 3006, 3049–3050, 3078, 3123, 3218). The trial examiner then ruled that further evidence of the same nature would be cumulative (X 3250–3251, 3253–3255, 3272–3273). The Board thereupon called several of the 1,200 employees, who testified contrary to the offer of proof (III 746, 750, 751, 753, IX 3274–3282, 3310–3313, 3320–3325, 3329–3330, 3344, 3408–3416, 3426–3435, 3467, 3469–3471, 3474, X 3497–3498, 3528, 3550–3554, 3558–3559, 3612, 3661, 3665–3670, 3691–3703). Thereafter, the trial examiner issued his intermediate report in which he found, "upon the entire record", that the Company had engaged in unfair labor practices in violation of Section 8 (1), (2),

[4] The Board overruled the Company's application for designation of another trial examiner, pointing out that all the grounds urged by the Company as showing bias and prejudice had been presented to the circuit court of appeals, which ruled them insufficient to establish disqualification (A 498–501).

and (3) of the Act and recommended that the Company cease and desist from such unfair labor practices and take certain affirmative action which he found would effectuate the policies of the Act (X 3837–3898).

On June 9, 1943, the Board issued its decision and order sustaining the rulings of the trial examiner in regard to the admission and rejection of evidence and approving and adopting, with exceptions not here material, his findings, conclusions, and recommendations (A 618–622). In regard to the evidence received pursuant to offers of proof at the first hearing, the Board stated that it had carefully considered all such evidence but "that the testimony in question does not overcome more positive evidence in the record that the [Company] committed acts of interference and assistance in the formation and administration of the D. G. W. U. which subjected that organization to the [Company's] domination and which removed from the employees' selection of the D. G. W. U. the complete freedom of choice which the Act contemplates." The Board added: "Since we find the evidence here adduced totally unpersuasive that the employees voluntarily designated the D. G. W. U., we are moreover impelled to adhere to the opinion, derived from our experience in administration of the Act, that conclusionary evidence of this nature is immaterial to issues such as those presented in this

case" (A 619). The facts as found by the Board may be summarized briefly as follows:*

In 1937, when the I. L. G. W. U. made attempts to organize the Company's employees, the Company took various steps to discourage the employees from joining, as it had done upon a previous occasion in 1934 when the I. L. G. W. U. had instituted a membership campaign (X 3859–3863). It continued to maintain and support an organization called the Loyalty League which it had formed in 1935 for the primary purpose of frustrating the organizational efforts of the I. L. G. W. U. (X 3861–3864). It permitted, encouraged, and directed the circulation throughout its plant during working hours of a pledge not to join any labor organization (X 3866–3867). Its president, Mrs. Reed, made a speech to the employees, expressing appreciation for the pledge and assuring them that she would attempt to protect them from any violent conduct on the part of I. L. G. W. U. organizers which she alleged was being threatened (X 3867–3869). Through its supervisory and management representatives, the Company approved and encouraged demonstrations against two employees who had dared to join the I. L. G. W. U. and forced such employees to leave its employ (X 3869–3871). Through two of its management representatives, Todd and Atherton, the Company hired an at-

* The evidence supporting the findings is set forth in detail at pp. 22–66, *infra*.

torney to advise its employees in opposing the I. L. G. W. U. (X 3872). At his suggestion, one of these management representatives, Todd, called a meeting of the employees during working hours[5] for the purpose of forming a plant union, the D. G. W. U., to combat the I. L. G. W. U. (X 3872). Supervisory employees, accompanied by their subordinates, attended, and the D. G. W. U. came into being with management representative Todd as its chairman (X 3872–3875). Thereafter, through the membership and activities of its supervisory employees in the D. G. W. U., through the membership solely of management representatives on its most important committee, the piece-work committee, through management's participation in determining eligibility to membership on the bargaining committee, through the grant of closed-shop and check-off agreements, and through the grant of financial and other support to the D. G. W. U., the Company continued its domination and control of the D. G. W. U. (X 3875–3884).

The Board concluded that by this conduct the Company had violated Section 8 (1), (2), and (3) of the Act (X 3866, 3869, 3871, 3886–3890) and ordered the Company to cease and desist from such unfair labor practices, to disestablish the D. G. W. U., to reimburse its employees for the

[5] The Board, unaided by additional evidence introduced at the second hearing (IX 3312–3314, 3430, 3457–3458, 3470–3471, X 3530, 3542, 3620, 3667), had previously found that the meeting took place after working hours (A 583).

dues and assessments which it had checked off from their wages on behalf of the D. G. W. U., and to post appropriate notices (A 621–622).

III

THE CIRCUIT COURT OF APPEALS' DECISION OF OCTOBER 29, 1945

Thereafter, the Company filed its petition in the court below to review and set aside the Board's order (A 1–360). The Board answered and requested enforcement of its order (A 361–365). The D. G. W. U. and the I. L. G. W. U. were permitted to intervene and file briefs (A 368–369). On October 29, 1945, the court below handed down its opinion (one judge concurring and another dissenting) and entered its decree denying enforcement of any part of the Board's order and setting aside the entire order for want of due process because the Board had failed to give probative weight to the conclusionary testimony received pursuant to the court's remand order of November 6, 1941; because the same trial examiner who presided at the first hearing again presided at the hearing on remand; and because the Board had refused to receive at the hearing on remand certain evidence which the court deemed material (XIII 7–71). The rejected evidence which the court below deemed material, together with the propriety of the trial examiner's exclusion of it, is discussed in detail, *infra*, pp. 35–104.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. (a) In holding that the Board, in dealing with the question of company domination of the D. G. W. U., denied due process to the Company and the D. G. W. U. by failing to give weight to testimony of the Company's employees that they freely formed and joined the D. G. W. U. and knew of no interference with, domination or support of that union by the Company.

(b) In holding that the trial examiner who presided at the hearing on remand was biased and incapable of giving such testimony proper consideration because he had expressed his opinion at the first hearing that such testimony was immaterial.

2. In holding that the Board had denied due process to the Company and the D. G. W. U. by refusing to receive in evidence labor agreements made by the I. L. G. W. U. with other employers.

3. In holding that the Board had denied due process to the Company and the D. G. W. U. by refusing to receive evidence as to whether or not the I. L. G. W. U. admitted to membership employees at other plants having duties similar to those of the Company's employees whom the Board found to be supervisory.

4. In holding that the Board had denied due process to the Company and the D. G. W. U. by refusing to receive evidence that the I. L. G. W. U.,

at and prior to the time of the formation of the D. G. W. U., had used fraud and violence at the plants of other employers to compel their employees to join the I. L. G. W. U.

5. In holding that the Board had denied due process to the Company and the D. G. W. U. by refusing to receive evidence as to whether the Company, prior to the passage of the Act, had discriminatorily discharged or laid off certain members of the I. L. G. W. U.

6. In setting aside and refusing to enforce the Board's order.

7. If the Board improperly failed to consider any evidence, in failing to remand to the Board such portions of the case as were affected by such failure of the Board.

SUMMARY OF ARGUMENT

I

The court below erred in setting aside and refusing to enforce the Board's order. The order was based upon findings of fact fully supporting and, indeed, compelling the Board's conclusion that the Company had engaged in unfair labor practices in violation of Section 8 (1), (2), and (3) of the Act. Neither the Board's treatment of the evidence received nor its refusal to receive evidence amounted to prejudicial error or a lack of due process.

To enable the Court to pass upon the substantiality of the evidence to support the Board's

findings, we have set out that evidence in detail in point I of the Argument and refer this Court to the statement of the Board's findings, *supra*, pp. 12–13, for a summary recital of it. The evidence fully supports the Board's ultimate findings that the Company engaged in unfair labor practices within the meaning of Section 8 (1), (2), and (3) of the Act, and warrants the Board's order requiring the Company to cease and desist from such unfair labor practices; to withdraw recognition from and completely to disestablish the D. G. W. U.; to reimburse its former and present employees for all dues and assessments which it had deducted from their wages; and to post appropriate notices.

II

In the face of this strong and compelling evidence that the Company dominated and interfered with the formation and administration of the D. G. W. U. and contributed financial and other support to it, employees of the Company testified that they formed and joined the D. G. W. U. of their own free will and were not influenced, interfered with, or coerced by the Company in their selection of a bargaining representative. The Board properly refused to give weight to this conclusionary testimony. This is so, in the first place, because the organization, structure, and Company support of the D. G. W. U. were such as to ensure Company domination. It is so, in

the second place, because even if the facts surrounding the formation, administration and support by the Company of the D. G. W. U did not compel a finding of violation by the Company of Section 8 (2) of the Act, the conclusionary testimony in question is so introspective and unreliable in character as to warrant the Board in treating it as overcome by "more positive evidence" or, indeed, in not receiving it at all.

The evidence can be of so little, if any, value that the Board should not be required to receive it. The domination, interference, and restraint of the employer having economic power over its employees over a long period of years, as here, necessarily colors the employee's point of view so that he cannot separate in his own mind those beliefs which have been instilled by his employer's unfair conduct from those which he formed or might have formed independently of such conduct. Hence an employee may believe that he has not been coerced and so testify, when in fact he has been coerced. And even if he realizes that he has been influenced or coerced by his employer's conduct, he may not feel free so to express himself while testifying in the presence of his employer or its representatives.

Finally, conclusionary evidence of the sort here involved may be excluded in the interests of judicial and administrative efficiency. Since testimony of some employees that they themselves had not been coerced would not disprove that

others had, in fact, been coerced, voluminous examination and cross-examination of all the employees might well be required. Such testimony would be of too little value to justify the large expenditure of time and money which would be required and the consequent interruption of the Act's remedial processes.

The court below erred in holding that the trial examiner was disqualified from presiding at the hearing on remand merely because he had expressed his opinion at the first hearing that the conclusionary testimony of employees was immaterial. As we have shown, he ruled correctly at the first hearing; but even if he had not, he was not, because of an erroneous ruling, thereafter disqualified from presiding at a remand hearing of the case. It is well settled that a judge is not disqualified from presiding at a hearing because of his previous erroneous rulings in the case. The same principle should apply with all the more force to a trial examiner, for he cannot decide the case, as can a judge, but can merely make recommendations to the Board, which alone has power to decide. Section 10 (c) of the Act.

III

The court below erred in holding that the Company and the D. G. W. U. were denied due process by the Board's refusal to receive evidence at the hearing on remand which did not fall within the category of evidence mentioned by the court in its

first opinion as having been improperly rejected by the trial examiner at the first hearing. Part of the evidence, the rejection of which at the remand hearing was considered by the court below to amount to a denial of due process, was not even offered at the first hearing. Part of it was offered and received, and the trial examiner only refused to receive cumulative evidence of the same nature. As to evidence in these categories, it is the Board's position that the parties should not be permitted to present their defenses piecemeal, that a single trial of the issue was enough. It is also the Board's position that the other evidence was not within the scope of the remand order because the propriety of its rejection at the first hearing was fully argued before the court and presumably fully considered by it prior to the remand order, and the court below, either expressly or by implication, approved the rejection of such evidence in its first opinion.

In any event, all of such evidence—evidence regarding eligibility of supervisory employees to membership in the I. L. G. W. U., evidence regarding the terms of the I. L. G. W. U. contracts, evidence bearing upon whether or not discharges and lay-offs occurring prior to the passage of the Act were discriminatory, and evidence of fraud or violence practiced by the I. L. G. W. U. at plants other than the Company's—was only remotely relevant or wholly immaterial to any issue

in this case and was properly rejected for that reason. The Board should not be required to sidetrack its hearing on the merits of the unfair labor practice charges by inquiring into such collateral matters.

IV

This case has been argued before the court below on four occasions, and that court has delivered three opinions therein. It has, however, not yet passed on the substantiality of the evidence in support of the Board's findings. This case has been pending before the Board and the courts for more than seven years, and under the circumstances, we think this Court should pass on that question now and direct that the Board's order be enforced in full so that further protracted proceedings before the court below may be avoided.

ARGUMENT

I

THE BOARD'S FINDINGS THAT THE COMPANY HAS ENGAGED IN UNFAIR LABOR PRACTICES IN CONTRAVENTION OF SECTION 8 (1), (2), AND (3) OF THE ACT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND SUSTAIN THE BOARD'S ORDER

The judge in the court below who wrote the opinion designated as the opinion of the court did not decide whether there was substantial evidence to support the Board's order (XIII 51).

A concurring judge felt that the question should be decided in the negative and the dissenting judge thought that it should be decided in the affirmative (XIII 55–56, 61, 64). To enable this Court to pass upon that question (see *infra*, pp. 104–106) and also to facilitate a better understanding of the other issues involved, a full statement of the Board's findings and the evidence supporting such findings is set forth below.[6]

A. THE COMPANY'S SUPERVISORY AND MANAGEMENT HIERARCHY

Before setting forth the various acts found by the Board to be unfair labor practices, we shall describe first the supervisory or management status of various employees, and the Company's responsibility for their participation in the formation and administration of the D. G. W. U. and in the commission of other unfair labor practices.

In the operation of its business of designing, manufacturing, selling, and distributing ladies' garments, the Company employs between 1,100 and 1,300 persons (X 3850; VII 2419–2422). The Company concedes responsibility for the labor relations conduct of its "principal officials"—Mrs. Reed, its president, Mr. Baty, its production manager, Mrs. Reeves, head of its merchandising

[6] In the following statement, references preceding the semicolon are to the pages of the record where the findings in the Intermediate Report which was adopted by the Board (A 618) appear; references following the semicolon are to the pages of the record where the supporting evidence appears.

department, Mrs. Hyde, its personnel director, and Mr. Keyes, its sales manager—but denies responsibility for the conduct of persons lower in its directive heirarchy (II 392–393, VII 2121–2124, 2127–2145, 2170–2173, X 3909–3911). The Company's position in this respect appears to be grounded largely on the absence in its plant of such normal titles as "foremen", "supervisors", or "group leaders" (I 17, 19, II 422). The Board, however, after considering their functions and positions, decided that in spite of the absence of the usual nomenclature, certain employees, such as instructors, thread girls, and other employees charged with managerial responsibilities and duties, were in fact supervisory employees and representatives of management and that their conduct in coercing and interfering with the employees in the exercise of their rights of self-organization and to select a bargaining representative was attributable to management (X 3850–3859). The Board was certainly entitled thus to base its decision on the role actually played by the supervisory employees rather than upon their titles. Cf. *Cupples Company, Mfrs. v. National Labor Relations Board,* 106 F. 2d 100, 114 (C.C.A. 8).

1. *Instructors and thread girls.*—The Company operates under what is known as the section system rather than the dressmaking system of manufacturing ladies' garments (VII 2252). Instead of each operator making a complete dress, which

requires experience and skill, each performs one sewing operation and a whole section of operators is required for the manufacture of a complete garment (VII 2252–2253). This requires almost no skill on the part of the individual operator but requires a large degree of planning and supervision on the part of management (IV 1120 ss, VII 2277, 2252–2253). The operators are grouped into sewing sections of 40 operators each and in charge of each section is an instructor and her assistant called a thread girl or floor girl (X 3850; I 18, II 392, 422, 507, III 1109, V 1374d VII 2253). For each style of garment to be made by the section, the instructor and thread girl are furnished with an instruction sheet in a code understood by the instructor and thread girl (II 503–505, VIII 2963–2967). The instruction sheet indicates the operations which the section is to perform on the garment, but the designation of the specific operators to perform each operation is left to the instructor and thread girl (II 505–507, VIII 2959, 2963–2964, IX 3104, 3326, 3434, 3469, X 3482–3483).

The instructors and thread girls, as the Board found, are in all respects the foremen and assistant foremen of their sections (X 3853). Mrs. Reed, the Company's president, in effect so conceded when she testified in 1935, before the old N. R. A. Board, regarding the duties of the instructor and thread girl, that she had, "40 operators, 40 machines, under this one supervisor with an assistant" (X 3851; III 1109). While

instructors lack the power to hire and fire, they assign work (X 3851; II 505–506, IX 3104, VIII 2959–2960), discipline girls (X 3851, 3853; IX 3464, III 1058–1059, IV 1120i, 1120u–1120v, 1120z–1120bb, 1120dd–1120ee, 1120 mm), and constitute the link through which the girls learn the management's directions (X 3852; I 302, 312–313, III 734c, 734g, VIII 2956–2957), and through which the management learns whether a girl is a desirable employee, her capacity for and her attitude towards work (X 3852; II 419–420, III 1059–1061, 1092–1093, V 1375). Instructors are fully responsible for their respective sections of the plant. They are assisted in all aspects of their work by the thread girls who assume charge whenever the instructors are absent (X 3851; IX 3153, 3326, 3435, III 1109).

The Board properly rejected the Company's contention that since June 1935, when it appointed Lee Baty as production manager and plant superintendent, he has been the sole supervisory employee over the production and maintenance employees (X 3851; II 518–519). The production department was composed in 1937 of approximately 1100 employees located on 7 different floors of the plant (II 490–491, VIII 2949–2955). The Company's contention postulates an arrangement under which it is improbable that any plant could operate. If Baty were the only person to exercise authority, to direct, discipline,

hire, lay-off, and discharge this large group of employees, he would have to observe personally the operations of all the operators in connection with those matters as well as such others as recommendations regarding wage increases, transfers, promotions, etc. Baty's testimony that he did just that (II 518–519) was inherently improbable and justifiably disbelieved (X 3851).

Moreover, the record affirmatively shows that no change was in fact made in the duties of the instructors and thread girls after Baty became production manager, and that they have at all times exercised a large amount of economic control over the girls in their sections (X 3850–3852; III 734e, 734g, 734i, 734k, IX 3327–3328, 3435, X 3556–3557, 3673–3674). They plan the work in each section, determining, when each new style comes in, which girls shall do which jobs (X 3852; VIII 2957–2960, 2963–2965, IX 3104, 3325–3326, 3434, 3468–3469, X 3482–3483). They keep the girls busy and correct mistakes (X 3852; II 670, IX 3468–3469). They determine who is to be laid off during slack periods (X 3852; I 302, X 3482–3483, 3517–3518, 3554–3557, 3673). When repair work is necessary, the instructor decides whether the girl to whom she assigns the work shall do it on her own time or receive pay for doing it (X 3852; VIII 2967, IX 3451, III 1059, IV 1120x–1120y). The instructors report to the office each week at a "going over of the cards

on the girls' work for the past week (X 3852; VIII 2962, III 1059, 1092–1094, 1104, IV 1120x–1120y, 1120mm). They regard themselves as supervisors (X 3852; IX 3324–3326, 3410, 3434, 3464), and are so regarded by the employees (X 3852; VIII 2604–2607, IX 3325, 3410, 3434, X 3481–3483, 3555, 3673–3675). Indeed, Mrs. Reeves, formerly factory manager and thereafter in charge of merchandising (X 3851–3852; VII 2171), herself testified that instructors "constantly supervise" the operators and that the words instructor and floor girl and the word supervisor "means one and the same to me" (X 3852–3853; II 422–423, III 1092–1093).

Under the circumstances, the Board correctly concluded "that the instructors and thread girls are supervisory employees and that they act as representatives of management in the factory" (X 3854). Their functions fall entirely within the accepted definitions of foremen, whose duties often include teaching or instructing their sub-

[7] The Board has repeatedly recognized that in the garment manufacturing industry, instructors are supervisory employees who are to be excluded from units of production and maintenance employees. *Matter of Union Underwear Co., Inc.*, 63 N. L. R. B. 92, 94; *Matter of Tubize Rayon Corp.*, 59 N. L. R. B. 82, 83–84; *Matter of Forest City Mfg. Co.*, 27 N. L. R. B. 1100, 1103–1105; *Matter of Wells-Lamont Smith Corp.*, 25 N. L. R. B. 21, 23–24; *Matter of Vicksburg Garment Co.*, 5 N. L. R. B. 301, 302–303. For similar rulings as to floor girls, see *Matter of Hirsch Shirt Corp.*, 12 N. L. R. B. 553, 560, 563; *Matter of Hayk v. Buck Co.*, 12 N. L. R. B. 230, 233.

ordinates. Thus Arthur G. Anderson, *Industrial Engineering and Factory Management*, p. 39, states:

> The foreman provides the necessary human element at the point of contact to make adjustments, rectify errors, remedy deficiencies, interpret and administer instructions, make reports, supervise work, and most important of all, provide personal leadership. In the final analysis the foreman is responsible for output. He is a manager, a teacher, a leader. As the farthest outpost of management, he is management to the workers.

As we have shown above, and as the Board found, the instructors and thread girls performed all of these functions (X 3850–3853). Upon such findings, the Company is clearly responsible for their activities. *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 520–521; *International Association of Machinists* v. *National Labor Relations Board* 311 U. S. 72, 80–81; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 599.

2. *Rose Todd.*—Rose Todd was a nurse by profession, and, through acquaintance with Mrs. Reed as a nurse, had secured a job with the Company in 1926 (X 3855; I 14, 142a, VII 2277–2278). The president of the bank with which the Company did business knew Todd for 10 or 12 years as a "kind of all-round man" for the Company

(X 3856; II 718w). From 1926 to 1931, she held several responsible positions at the factory, including that of an instructor, and served as an assistant to Dewey Atchison, production engineer (X 3855; I 19–23, VII 2279, IX 3414). During 1932 she left the Company's employ and for a short period was in charge of the Gernes Garment Company plant in Kansas City (X 3855; V 1374c). Upon returning to the Company's employ, she worked for a while as a thread girl (X 3855; I 23–24).

Todd apparently had no well-defined duties at the time of the formation of the D. G. W. U. and thereafter, but was assigned a desk and among other duties was charged with the responsibility of keeping the different sections of the plant supplied with materials necessary to keep production going (X 3855; I 26–28, 30–31, VII 2116–2117, 2166–2167, VIII 2726, 2830). These duties and others required her frequently to move throughout the plant and to interview the instructors and thread girls (X 3856; I 24–24a, 29). Her status was such that the telephone operators readily announced over the inter-departmental telephones Loyalty League and D. G. W. U. meetings called by Todd, although inter-departmental telephones were reserved for Company business; and instructors readily took directions from her as to the form in which they were to turn in time slips for employees absent on D. G. W. U. business (X 3857; V 1374d, IX 3342, 3429, cf. X 3487,

3672). Her status was such also that when she, in the presence of Production Manager Baty and Personnel Manager Hyde, purported to explain the Company's employment policy to employee Sigler, who was sent home following a demonstration against her for wearing an I. L. G. W. U. pin, they acquiesced in Todd's statements and assumption of authority, thereby permitting her to appear as a representative of management in the eyes of the employees (X 3856–3857; I 80, III 801–807). By reason of her position also, she often had lunch in the Company's private dining room which was reserved for executives and supervisory personnel (X 3674–3675).

Todd was president of the Loyalty League, a management-sponsored organization to which all of the Company's supervisory force, including Sales Manager Keyes, Employment Manager Hyde, Production Manager Reeves, and Production Engineer Atchison, belonged, and which came into existence in 1935 to counteract the I. L. G. W. U.'s organizational activities (*infra*, pp. 37–46, 53). This position helped to mark Todd in the eyes of the employees as a person whom management was willing to have direct its employees' anti-union activities. As president also, of the D. G. W. U., she was permitted to use the desk furnished her by the Company in transacting business for that organization and to spend substantial amounts of her working time in

attending to its affairs with the knowledge and permission of management (X 3886–3887; I 127–128, 166, III 833, 835, 869). Although paid a salary of $65.00 per month by the D. G. W. U. for her services thus rendered, the Company continued to pay her regular salary in addition, thereby recognizing that her activities in connection with the D. G. W. U. were performed as a part of her duties for the Company (X 3856; I 31–32, III 915, 1006, 1010, 1010b, 1010c, 1010e, 1010h).

It was well within the Board's competence to find, as it did, that in her labor relations activities Todd "was acting for and on behalf of" the Company (X 3858). In so finding, the Board cited and followed the persuasive language of the Court of Appeals for the District of Columbia in *International Association of Machinists* v. *National Labor Relations Board,* 110 F. 2d 29, 44–45, affirmed, 311 U. S. 72. To the same effect, see *National Labor Relations Board* v. *Link-Belt Co.,* 311 U. S. 584, 599; *Union Drawn Steel Co.* v. *National Labor Relations Board,* 109 F. 2d 587, 589–591 (C. C. A. 3); *Triplex Screw Co.* v. *National Labor Relations Board,* 117 F. 2d 858, 860 (C. C. A. 6); *Atlas Underwear Co.* v. *National Labor Relations Board,* 116 F. 2d 1020, 1022–1023 (C. C. A. 6). The employees involved in the *Atlas* and the *Triplex* cases bore a striking resemblance to Todd; each held a position which gave him ready access to the entire plant and each

was favored with signs of management confidence.[8]

3. *Other supervisory employees.*—Other employees found by the Board to be supervisors and representatives of management, and who were active in the Loyalty League or the D. G. W. U., were heads of the various departments or sections, *i. e.:* Hobart Atherton, in charge of machine maintenance; Florence Strickland, in charge of

[8] In the *Atlas* case, an employee named Wright served as an "order chaser," a position which gave him access to employees in every department in the plant. While continuing to receive his regular salary, Wright devoted much of his time to the organization of the union found by the Board to be company-dominated. The Board contended that the Company was answerable under the Act for these activities on Wright's part. Although he admittedly was not a supervisory employee, the court held (116 F. 2d at 1023): "It is now settled that the employer may gain no advantage from the acts of those who reasonably may be regarded by employees as representing the policy of the management, and that neither the principles of agency nor the doctrine of *respondent superior* are applicable, where the consequence of such acts is employee fear of reprisals if the inside union is not supported. *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514." See also *National Labor Relations Board* v. *Southern Bell Telephone Co.*, 319 U. S. 50 54; *National Labor Relations Board* v. *Laister-Kauffmann Aircraft Corp.*, 144 F. 2d 9, 15 (C. C. A. 8); *National Labor Relations Board* v. *American Manufacturing Co.*, 106 F. 2d 61, 68 (C. C. A. 2), affirmed, 309 U. S. 629; *Republic Steel Corp.* v. *National Labor Relations Board*, 107 F. 2d 472, 476, 477 (C. C. A. 3), certiorari denied, 309 U. S. 684; *Swift & Co.* v. *National Labor Relations Board*, 106 F. 2d 87, 92–97 (C. C. A. 10); *National Labor Relations Board* v. *J. Greenebaum Tanning Co.*, 110 F. 2d 984, 987 (C. C. A. 7), certiorari denied, 311 U. S. 662; *System Federation No. 40* v. *Virginian Railway Co.*, 11 F. Supp. 621 (E. D. Va.), affirmed, 84 F. 2d 641 (C. C. A. 4), affirmed, 300 U. S. 515.

the pattern department; Lena Tyhurst, in charge of the inspection department; Martha Gray, in charge of the outlet store; Ortense Root, in charge of the sample department; Heath Cowan, in charge of the receiving department; Marvin Price, in charge of building maintenance; Ted Scoles, in charge of the cutting department; Dewey Atchison, production engineer; and Mary Bogart, in charge of the dividing department (X 3858–3859, 3860, 3861–3863, 3870, 3877; I 136, II 424–424a, 424d, 428–429, 510, 514–515, 551, 589, 591–592, III 1003, 1007, 1011, 1090–1091, V 1349–1350, VII 2175, 2255–2257, Cf. 2200–2203, 2007–2012, VIII 2961–2962, IX 3157, 3233, 3336, 3435–3437, 3445–3446, X 3572, 3644–3645, 3649–3650, 3673). Each of these employees, who had a status approximately coordinate with the instructors (II 424–424c, III 1010q, VII 2143, IX 3435–3436, 3445, X3673–3675), held a position with at least as much authority as did the "group leaders" for whose conduct this Court held the employer responsible in *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 519–521. Moreover, no other representative of the Company was shown to have exercised any direct control or supervision over any of the employees under these department or section heads. There is ample support, therefore, for the Board's conclusion that these persons "are supervisory employees and as such were representatives of management" (X 3858–3859).

B. THE COMPANY'S PRE-ACT BACKGROUND OF ANTI-UNION ACTIVITIES

1. *The Company's opposition to the I. L. G. W. U. during its 1934 campaign.*—In 1934, the I. L. G. W. U. established an office in Kansas City, Missouri, and began its organization of the garment workers of Kansas City, including the employees of the Company (X 3859; IV 1307–1312). Open meetings to which all of the Company's employees were invited were held by the I. L. G. W. U. on March 15 and December 4, 1934 (X 3859; III 1033–1034, 1102, 1104). On both occasions, the Company's supervisory force, including Mrs. Reeves, then production manager (X 3859–3860; III 1058, 1105–1106, IV 1113; 1120g), Mrs. Hyde, personnel manager (X 3860; III 1107–1108), and many of the instructors (X 3860; III 1034, 1103–1104, 1106–1107), attended the meetings in a group. In addition, Ross Todd, whose relation to the management is discussed *supra*, pp. 28–32, attended the first meeting (X 3860; I 44), and Dewey Atchison, production engineer, attended the last meeting (X 3860; III 1091, 1096–1097).

During 1934, at least a dozen of the Company's employees joined the I. L. G. W. U. (X 3860; III 1033, 1036–1037, 1043, 1048, 1052, 1098, IV 1120–1120vv, 1141, 1153, 1156–1157). Several of them became active passing out notices of meetings and soliciting their fellow workers (X 3860; III 1098–1099, IV 1120oo–1120rr, 1153–1156b). Employees who were observed attending meetings and others were called to the office where Production

Manager Reeves questioned them about their interest in the Union, reprimanded those who had joined, and warned others that joining would do them no good (X 3860; I 306–308, III 1035–1036, 1044–1046, 1052–1055, 1067–1068, 1073–1074, 1076, 1079–1087, IV 1141, 1153–1154, 1329). Mrs. Gray, manager of the Company's retail outlet store (X 3860; IX 3336, X 3572, 3644–3645), told an employee that it was a "shame" that she had joined the I. L. G. W. U. (X 3860; III 1088–1089). Production Engineer Dewey Atchison asked employees why they did not come to the Company instead of "going down to a bunch of foreigners" (X 3860; III 1068, IV 1331), advised against getting "messed up" with the Union (X 3860; III 1100–1101), and warned that they would be fired if they did (X 3860; III 1101–1102). The instructors, who at that time unquestionably had power to direct, discipline, and recommend the discharge of employees (X 3850; III 1059, 1061, 1091–1096, IV 1120i–1120k, 1120aa, 1120ee, 1120*ll*–1120mm, VII 2416), also warned employees that those who joined the I. L. G. W. U. would be discharged and urged employees not to give their money "to those foreigners" (X 3860; III 1047–1048, 1063, 1069, 1090, IV 1150–1151, 1323, 1325–1326, 1329, 1331). One instructor referred to the I. L. G. W. U. members as "scum" (X 3860; III 1070, IV 1331).

A substantial number of the employees who joined the I. L. G. W. U. were laid off or discharged shortly after joining. In June 1934,

about a dozen employees attended a dinner for the purpose of discussing joining a labor organization at the home of Mrs. Yarnell, an employee who had joined the I. L. G. W. U. (X 3860–3861; III 1036–1037, 1046–1051, 1098 IV 1153). Mrs. Yarnell was discharged in July 1934, although she had worked for the Company since December 1924 (X 3861; III 1046–1049). Within a few months thereafter, all except one of the girls who had attended the dinner were either laid off or discharged (X 3861; III 1037–1040; 1042–1044, 1051). As a result of these lay-offs or discharges, the I. L. G. W. U. filed a charge against the Company under Section 7 (a) of the National Industrial Recovery Act, alleging that eight employees had been laid off because they joined the I. L. G. W. U. (X 3861; IV 1316–1317). A hearing on these charges was held in the spring of 1935 but, before a decision issued, the National Industrial Recovery Act was declared unconstitutional by this Court (X 3861; III 1032–1110a, IV 1318).

In the latter part of 1934 and the first part of 1935, all the remaining employees who were known to have joined the I. L. G. W. U. were transferred from the Company's main plant to a temporary branch, and laid off when the branch closed down in June 1935, despite the fact that most of these girls had several years service with the Company, whereas employees in the main plant with less service were retained (X 3861; III 1062–1066, 1073–1077, IV 1120nu–1120vv,

1126v–1129, 1130d–1130e, 1132, 1135–1136, 1156b–1157, 1324–1325, 1327, 1333–1334).

The Board expressly refused to make any finding as to whether the discharges and lay-offs were discriminatory (X 3860, n. 25); however, it did find, on the testimony of some of the employees, that as a result of the sequence of events above related, employees became afraid to join, admit their membership in, or discuss the I. L. G. W. U. (X 3861; III 1044–1046, 1047–1048, 1076, 1080–1081, 1084, 1141–1142).[9]

2. *Formation of the Loyalty League.*—In February 1935, Mrs. Gray, manager of the Company's retail store (X 3861; IX 3336, X 3572, 3644–3645), and Mrs. Strickland, head of the pattern department (X 3861; IX 3233, X 3650), formed an organization among the Company's employees known as the "Nelly Don Loyalty League" (X 3861; III 798d–798e, 1078, IX 3336, 3439). The initial step in its organization was a meeting at the home of Mrs. Gray, attended by approximately 50 employees, representing the various divisions of the factory (X 3861; III 732–733, 798e, IX 3030, 3032). Within the next three days, membership cards were circulated and signed by substantially all of the Company's employees

[9] As shown, *infra*, pp. 90–92, all evidence offered by the parties at the first hearing respecting these lay-offs and discharges, was received by the trial examiner; however, he refused to receive further evidence on this matter at the hearing on remand.

(X 3861–3862; III 798e). Mrs. Strickland, in circulating the cards, stated that Mrs. Reed "would close her doors before she would have a union shop, and we should sign these cards to keep our jobs and keep us in work because she would close the doors" (X 3862; III 1078). The statement of association circulated with the membership cards (X 3862; I 181, 304–305, V 1620, IX 3032), stated that:

> We protest against and will resist all attempts of outside interference with the business of said company or with our relations to the company as employees.
>
> We recognize the fact that * * * * we have had generous and fair treatment from Nelly Don (Mrs. Reed), President of the company, and we repose our confidence in her rather than in professional agitators who are sent here to create discontent among the employees of the company.

Mrs. Strickland refused to allow Virginia Stroup, who was president of the I. L. G. W. U. local, to sign a membership card because she belonged to another organization (X 3862; III 1078–1079). Similarly Instructor Allison refused to give Frances Reidel a card on the ground that she was an I. L. G. W. U. member (X 3862; III 1071).

Following the signing of the cards, on February 8, 1935, a mass meeting of all the employees was held during working hours on the second

floor of the building occupied by the Company's plant (X 3862; I 308, VIII 2666, IX 3033, 3066–3067, 3439). Mrs. Gray presided and explained the meaning of the word "loyalty" (X 3862; III 733, 798e, VIII 2667, IX 3032, 3439).

All of the Company's supervisory employees, including Sales Manager Keyes, Employment Manager Hyde, Production Manager Reeves, and Production Engineer Atchison, became members of the League (X 3859, 3860, 3863; II 407, 429, 431, III 1091, 1097, 1108, IV 1113, 1117). Meetings of the League were regularly held on the second floor of the building (X 3862; I 39–40, 309, VIII 2666, IX 3033, 3067). These were announced by notice to the instructors, transmitted either by Mrs. Wherry, factory manager (III 1011, 1095–1096, 1108, IX 3344, 3435), or by the Company's switchboard operator, calling each section; the instructors in turn notified the girls in their sections to attend the meeting (X 3862; I 308–309, IX 3328, 3337, 3398, 3457).

Each section of the plant had a representative, elected during working hours by the employees in the section, to represent them in the League (X 3862–3863; I 39, II 378j–378k, III 798e, VIII 2888–2889, IX 3032–3033, 3148). The League had songs of loyalty and sponsored the wearing of pins bearing the initial "L" as a demonstration of loyalty to Mrs. Reed (X 3863; I 319–320, II 542, VIII 2581, 2608–2609, 2667, 2694, 2843, X 3572).

C. THE COMPANY'S CONTINUED OPPOSITION TO THE I. L. G. W. U.; UNFAIR LABOR PRACTICES PRECEDING FORMATION OF THE D. G. W. U.

1. *Events culminating in the "Loyalty Pledge" of March 2, 1937.*—Following the lay-offs and discharges of non-I. L. G. W. U. members in late 1934 and early 1935, the organization of the Loyalty League in 1935, and the inability of the I. L. G. W. U. to carry to a successful conclusion its case under the National Industrial Recovery Act due to the decision declaring that Act unconstitutional, labor relations at the Company's plant remained in a static condition until March 1937 (X 3864). The Loyalty League continued in existence; new employees were invited to join; and solicitations took place on Company time and property (X 3864; VIII 2607–2608, X 3572). In some instances, instructors brought new employees notices that they were eligible to membership, directed them to the desk of Rose Todd, the Loyalty League president, and later brought them their Loyalty League pins (X 3864; VIII 2607–2608, X 3572). Although, as the Board was careful to point out, the formation of the Loyalty League preceded the passage of the Act by about five months and was, therefore, not a violation of the Act (X 3863–3864), its continuance subsequent to the enactment of the Act, the continued participation of its supervisory employees in its affairs, including the leadership of Todd as its president, and the Company's grant to the League

of its time and facilities, were undoubtedly violations of the Act. Since, as the Board found, the Company used the League and its officers "for the purpose of impeding and preventing the organization of its employees by the I. L. G. W.-U.", it interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act (X 3871, 3889).

On March 2, 1937, within a few days after the I. L. G. W. U. had announced in the newspapers a second campaign to organize the Donnelly employees (X 3864–3865; III 1019), Mary Sprofera and Inez Warren, shipping clerks, went during working hours to most of the Company's factory workers and secured their signatures to a pledge which read as follows (X 3865; V 1623–1647):

> We, the undersigned, as members of the Donnelly Garment Co. wish to make it known we are positively happy and contented with the positions which we hold with this organization and refuse to acknowledge any union labor organization. We are thankful for the real humanitarian interest extended by our employer, Mrs. Reed.

The pledge was passed through the sewing sections, being handed from girl to girl while they were at work at their machines (X 3865; I 311–312, II 594, 602, VIII 2578, 2609–2615, 2637–2638, 2725). The instructors and thread girls knew that the pledge was being passed, but, with seven

exceptions,[10] they themselves did not sign when the pledge went through their respective sections (X 3865; I 311–312, IX 3334–3335, 3438–3439). Three employees, Sylvia Hull, Mamie Carlson, and Elsie Greenhaw, refused to sign, one stating that she disagreed with the expression of opposition to labor organizations, another that she was not satisfied with conditions (X 3865; I 354–354a, 354p–354q, II 377–378, V 1354–1355). Two of these girls later signed for fear of losing their jobs but their names were erased (X 3865; V 1354–1356, VII 2432–2433, Tr. 1832). At least one other employee whose name was not erased signed for fear of being fired (X 3665).

On the afternoon of the same day, employees Sprofera and Warren presented the signed pledge to Mrs. Reed at her home (X 3865; II 513–514, IV 1300, VII 2074–2077, 2431–2437). Thereafter, as a result of arrangements made between Mrs. Reed and newspaper representatives, a picture of the girls presenting the pledge was taken and appeared on the front page of a local newspaper, accompanied by the statement that Mrs. Reed was

[10] Instructors Carrie Abrams (III 1004, V 1631, VIII 2893–2894, 2950), Ada Wolfe (II 721, III 1005, V 1623, VIII 2611–2612), Clara Finnell (III 1004, V 1627, VIII 2951), and Helen Little (II 424b, III 1007, V 1631, X 3675), and thread girls Nellie Biggs (III 1003, V 1629, VIII 2949, X 3551), Grace Davis (III 1004, V 1627), and Emma Grober (III 1004, V 1631, VIII 2951), signed the pledge when it went through their respective sections (X 3865).

going to place the pledge in the cornerstone of a new building she was planning to erect (X 3865; II 513–514, VII 2074–2077, 2434–2436).

Mrs. Reed shortly thereafter expressed to her office manager and head of the accounting department, Mrs. Keyes, a wish that all the employees, not merely factory workers, should sign the pledge (X 3866; X 3640–3641, 3657–3658). Mrs. Keyes thereupon had one of the girls in her department, Pauline Shartzer, circulate the pledge among all the employees who had theretofore not signed (X 3866; I 354–354a, IV 1299–1300, X 3641–3644). As a result, everyone in the plant, including the full supervisory force, watchmen, porters, maids, stenographers, indeed, every employee except the three heretofore mentioned, signed the pledge (X 3866; I 354a, IV 1288–1291, V 1643–1649, VII 2432–2433, VIII 2947–2955, IX 3335, X 3642–3644).

The Company thus used its influence flowing from its economic power over the employees to preclude the choice of a bargaining representative by them. Such solicitation of employee expressions of opposition to unionization during working hours, with the knowledge and approval of the employer, has uniformly been held violative of the Act. *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 870 (C. C. A. 2), certiorari denied, 304 U. S. 576; *Titan Metal Mfg. Co.* v. *National Labor Relations Board*, 106

F. 2d 254, 260 (C. C. A. 3), certiorari denied, 308 U. S. 615; *National Labor Relations Board* v. *New Era Die Co.*, 118 F. 2d 500, 503 (C. C. A. 3); *Virginia Ferry Corp.* v. *National Labor Relations Board*, 101 F. 2d, 103, 104 (C. C. A. 4); *National Labor Relations Board* v. *West Kentucky Coal Co.*, 116 F. 2d 816, 817 (C. C. A. 6); *National Labor Relations Board* v. *Colten*, 105 F. 2d 179, 181–182 (C. C. A. 6); *Wilson & Co.* v. *National Labor Relations Board*, 103 F. 2d 248, 251 (C. C. A. 8); *Swift & Co.* v. *National Labor Relations Board*, 106 F. 2d 87, 94 (C. C. A. 10).

2. *The March 18, 1937, meeting.*—Following the publication in a local newspaper of an announcement that the I. L. G. W. U. had officially launched a campaign to organize the Company's employees (X 3866; III 1021), that organization, on March 9, 1937, sent the Company a letter requesting a bargaining conference (X 3866–3867; III 1022–1024). The Company did not reply to this letter, but its president, Mrs. Reed, had the letter read to a mass meeting of all the employees on March 18 (X 3867–3868; I 48–49, 147–148, 310, 354b–354c, II 588, VIII 2620).

This meeting was sponsored by the Loyalty League and its officials and was called to discuss means of combatting the I. L. G. W. U.'s projected organizational campaign (X 3867, note 35); like the previous meetings of employees, it was held during working hours on the second floor of the building housing the Company's plant (X

3867; I 308–309, IX 3328–3330, 3438, 3457–3458, X 3575, 3666). The employees were notified orally by their instructors that they were to attend the meeting, the instructors in turn having been notified either by Factory Manager Wherry or over the plant telephones (X 3867; I 308–309, 354b, II 595, IX 3328, 3438, 3457, X 3539–3540, 3575, 3666). The meeting was attended by most of the Company's supervisory force (X 3867; I 309–310, II 534, IX 3438).

Rose Todd, who was at that time president of the Loyalty League as well as closely associated with the management (see discussion of Todd, *supra*, pp. 28–32), presided at the meeting (X 3867–3868; I 44d). Chairs for the meeting were rented from a local business concern in the name of the Loyalty League (X 3867; I 334w, 345, III 960, 962, V 1621).

Following a few opening remarks by Todd, Mrs. Reed was invited to come in and address the employees (X 3868; I 48). Mrs. Reed brought the letter from the I. L. G. W. U. with her and, as we have said, had someone read it to the assembly (X 3868; I 48–49, 147–148, 310, 354b–354c, II 588, VIII 2620). She then made a speech in which she inaccurately described the Company's past labor policy, asserting that the employees had never been asked whether or not they belonged to any union (see account of the Company's questioning of employees in 1934, *supra*, pp. 34–35); promised to protect her employees from violence

at the hands of the I. L. G. W. U. (X 3868; III 1029–1030); and stated that neither Dubinsky, president of the I. L. G. W. U., nor any other "but-tinsky" could intimidate her or the Company into forcing the employees to join the I. L. G. W. U. (X 3868; III 1030).[108] She also told the employees "I have had lots of nice things happen to me in my lifetime, but I have never had anything that made me so proud and so happy as the list of names that came to my house"—referring to the "Loyalty" pledge in which her employees had unanimously agreed to refuse to accept any labor organization (X 3868–3869; III 1029). The Board found that Mrs. Reed's remarks made it plain to the employees that the Company's attitude toward unionization had not changed and that membership of any of the employees in the I. L. G. W. U. was not to be tolerated (X 3869; I 310, 354c, III 1029, V 1362a, IX 3332, 3413, 3438, 3459, X 3666).

The Board appraised the speech in the setting in which it occurred. The calling by Todd of the meeting avowedly to discuss means of preventing organization of the plant by the I. L. G. W. U. and her assumption of the chairmanship of the meeting, in view of her supervisory status, her confidential status, and her presidency of the anti-

[108] Numerous witnesses testified that Mrs. Reed referred to "Mr. Dubinsky or any other ski" (I. 310, 354c, V. 1362a, IX 3332, 3413, 3438, 3459, X 3576, 3666). The Board did not resolve this conflict in testimony (X 3868).

union Loyalty League, were themselves improper. The use of the interdepartmental phones, the relaying by instructors to employees of the direction to attend such a meeting, and the holding of the meeting during working hours, were likewise violative of the Act. In this setting, and in the light of the Company's anti-union background, the Board's finding that Mrs. Reed's speech interfered with and coerced employees in the rights guaranteed them under Section 7 of the Act, is plainly warranted. The speech, in this setting, was not protected by the First Amendment. See *National Labor Relations Board* v. *Virginia Electric and Power Co.*, 314 U. S. 469, 477; *Virginia Electric and Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, 538–539, affirming 132 F. 2d 390 (C. C. A. 4); *Thomas* v. *Collins*, 323 U. S. 516, 537; *National Labor Relations Board* v. *American Laundry Machinery Co.*, 152 F. 2d 400, 401 (C. C. A. 2); *National Labor Relations Board* v. *M. E. Blatt Co.*, 143 F. 2d 268, 273–275 (C. C. A. 3), certiorari denied, 323 U. S. 774; *National Labor Relations Board* v. *Trojan Powder Co.*, 135 F. 2d 337, 339 (C. C. A. 3), certiorari denied, 320 U. S. 768; *Elastic Stop Nut Corp.* v. *National Labor Relations Board*, 142 F. 2d 371, 378 (C. C. A. 8), certiorari denied, 323 U. S. 722; *Reliance Mfg. Co.* v. *National Labor Relations Board*, 143 F. 2d 761, 763 (C. C. A. 7); *National Labor Relations Board* v. *William Davies Co.*, 135 F. 2d 179, 181 (C. C. A. 7), certio-

rari denied, 320 U. S. 770; *R. R. Donnelley & Sons Co.* v. *National Labor Relations Board* (C. C. A. 7).

3. *The April 23, 1937, demonstration against I. L. G. W. U. members.*—On April 22, 1937, a local newspaper carried an announcement by the I. L. G. W. U. that Sylvia Hull, one of the Company's operators, had been named as a delegate to the bi-annual convention of the I. L. G. W. U. (X 3869; III 1015). On the next morning, from the time Hull arrived at work until she was removed from her machine by Mrs. Hyde, employment manager, she was subjected to a continuous anti-union demonstration (X 3869–3870; II 535, 541–542d, IV 1339–1340, V 1341–1350, IX 3013–3015, 3479–3480, X 3517). Although Hull sat at her machine sewing and did nothing to provoke any hostility, girls from all over the plant came in groups to her place of work on the eighth floor of the plant (X 3870; IV 1340, V 1341–1343, 1349–1350, VIII 2693, 2926–2927, 2991–2993, IX 3013–3015, 3480). They told Hull that she could not belong to the I. L. G. W. U. and demanded that she surrender her Loyalty League pin (X 3870; IV 1346–1347, 1349, IX 3014, 3036, 3042–3043). Some of the girls stood on nearby tables (X 3870; V 1346–1347); they sang songs and booed (X 3870; V 1346, VIII 2665, 2693, IX 3479–3480). Although Mrs. Allison, the instructor of the section in which Hull worked, was present throughout the demonstration, she did not order the girls back

to work or take any kind of action (X 3870; II 663–664, V 1343–1344, 1347, 1350, X 3573). Mrs. Bogart, head of the dividing department, was also present and pointed Hull out to some of the demonstrators (X 3870; V 1349–1350, IX 3437, 3445–3446). After the demonstration had continued for an hour or so, Employment Manager Hyde appeared and, after watching the demonstration for a short time, ordered the girls to return to work; when they refused to do so, she removed Hull from the floor and sent her home (X 3870; II 535–536, V 1356–1357, X 3517, 3573).

On the same day, Fern Sigler came to work, displaying for the first time her I. L. G. W. U. membership pin, and also wearing a Loyalty League pin (X 3870; I 319). She was subjected to a demonstration similar in character to that to which Hull was subjected (X 3870; I 70–72, 315–316, 319, 321–325, X 3666–3667). Sigler attempted, throughout the demonstrations, to continue sewing, and even when Production Manager Baty, accompanied by Rose Todd, ordered Sigler to his office, she expressed the desire to remain at her work (X 3870–3871; II 442, 444–445, 497–499, 544). Baty, however, commanded her to go to his office and she complied (X 3871; II 444).

The interview in Baty's office was participated in by Mrs. Hyde, Mr. Baty and Miss Todd (X 3871; III 801–807). When Baty insisted on sending Sigler home, she argued with him that she

had a right to join the I. L. G. W. U., and that it was the employer's duty to control its employees. Baty replied, "We don't go into the Wagner Act. We are just running our business here and not a law office." Rose Todd then purported to explain the Company's labor relations policies and told Sigler, among other things, "We are going to run an open shop as long as the majority feels that way" (X 3871; III 801–807).

As a result, Sigler was sent home at once, while no steps were taken to discipline any of the demonstrators (X 3871; II 445, 499, 542–542b, III 807). Neither Hull nor Sigler thereafter returned to work at the plant (X 3890; II 499, 536, 543, 549). While the Company claims to have made attempts to recall Hull, it never actually reached her, nor did the Company take any steps which would guarantee either of the girls safe, unmolested work (X 3871, 3890; II 536, 543, 548–549, V 1356–1357).

Upon these facts, the Board concluded that the Company "approved of and encouraged the demonstrations and took advantage of them to reveal once more to the employees its hostility to the I. L. G. W. U. and its support of anti-I. L. G. W. U. activities," thereby violating Section 8 (1) of the Act (X 3871). The Board also found that Hull did not voluntarily leave her employment, but that the Company temporarily laid her off because of her membership in and activities on behalf of the I. L. G. W. U.,

thereby discriminating in regard to her tenure of employment in violation of Section 8 (3) of the Act (X 3890).[11]

These findings are clearly proper irrespective of whether the demonstrations arose from the Company's prior anti-union activities or from an independent antipathy of the employees to the I. L. G. W. U. One major purpose of the Act is to prevent abuse of the economic power which an employer wields over its employees so as to interfere with and restrain them in the selection of a bargaining agent.[12] Such abuse may plainly result from omission as well as commission on the part of the employer.[13] The Board, as well as the Company's employees, could not but recognize that, in the normal course of operations, an employer is

[11] The complaint did not allege that Sigler's employment was discriminatorily terminated and the Board made no finding in that regard (X 3871, n. 38).

[12] See Section 1 of the Act. See also, S. Rep. No. 573, 74th Cong., 1st Sess., pp. 3, 10; H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 16, 17–18.

[13] Compare *National Labor Relations Board* v. *Hudson Motor Car Co.*, 128 F. 2d 528, 531, 532–533 (C. C. A. 6); *Kansas City Power and Light Co.* v. *National Labor Relations Board*, 111 F. 2d 340, 346–347 (C. C. A. 8); *Westinghouse Electric and Manufacturing Co.* v. *National Labor Relations Board*, 112 F. 2d 657, 660–661 (C. C. A. 2), affirmed *per curiam*, 312 U. S. 660; *Western Union Telegraph Co.* v. *National Labor Relations Board*, 113 F. 2d 992, 996 (C. C. A. 2); *Swift & Co.* v. *National Labor Relations Board*, 106 F. 2d 87, 93 (C. C. A. 10). In each of these cases the court found the source of employer responsibility for unfair labor practices in the fact that it failed to take affirmative action.

prompt to halt, by invocation of its power to discipline, any substantial disturbances which may interrupt its operations. The Company's failure to follow this normal procedure in this case was a patent abuse of its authority over its employees and manifested its approval of such conduct. Cf. *National Labor Relations Board* v. *Elkland Leather Co.*, 114 F. 2d 221, 223 (C. C. A. 3), certiorari denied, 311 U. S. 705. And in considering the effect of such manifest approval upon the employees, the Board could not ignore the part which the Company had already played in fostering hostility to the I. L. G. W. U. An employer may not escape responsibility for the anti-union acts of its employees where "the attitude of the [employer's] non-union men was, if not inspired by, at least encouraged and promoted by the [employer] and its agents." *Clover Fork Coal Co.* v. *National Labor Relations Board*, 97 F. 2d 331, 335 (C. C. A. 6); *National Labor Relations Board* v. *New Era Die Co., Inc.*, 118 F. 2d 500, 504 (C. C. A. 3); *National Labor Relations Board* v. *Weirton Steel Co.*, 135 F. 2d 494, 495 (C. C. A. 3); *National Labor Relations Board* v. *Taylor-Colquitt Co.*, 140 F. 2d 92, 93 (C. C. A. 4); *National Labor Relations Board* v. *Goodyear Tire and Rubber Co.*, 129 F. 2d 661, 664 (C. C. A. 5); *National Labor Relations Board* v. *J. Greenebaum Tanning Co.*, 110 F. 2d 984, 987 (C. C. A. 7), certiorari denied, 311 U. S. 662; *National Labor Relations Board* v. *General Motors Corp.*, 116 F. 2d 306, 309–310

(C. C. A. 7); *National Labor Relations Board* v. *J. G. Boswell Co.*, 136 F. 2d 585, 591 (C. C. A. 9).

D. FORMATION OF THE D. G. W. U.; COMPANY PARTICIPATION AND SUPPORT

1. *Formation and administration of the D. G. W. U. by Company representatives.*— Shortly after the March 18 meeting at which Mrs. Reed addressed the employees, two representatives of management, Todd and Atherton, both of whom were officers of the Loyalty League, and another employee, Ormsby, hired an attorney, Tyler, to advise the employees in opposing the I. L. G. W. U. (X 3872; I 38–39, 176, II 555–556, 558–559, Tr. 318). When Tyler asked for a retainer fee, Todd borrowed $1,000 from a local bank upon the unsecured note of the Loyalty League (X 3872; II 556–557; III 959), deposited the money in the Loyalty League checking account, and a League check, signed by Todd as president, and Hartman as treasurer, was given to Tyler (X 3872; I 179, II 378i, 378l–378q, III 949). Upon the attorney's advice that the best way to combat the I. L. G. W. U. was to form a plant union—advice which was given only after this Court held the Wagner Act constitutional on April 12, 1937—Todd called a meeting of the employees on April 27 for that purpose. This meeting was held during working hours. (X 3872; I 328c–328d, II 558–559, IV 1365–1366, IX 3312–3314, 3430, 3457–3458, 3470–3471, X 3530, 3541, 3620, 3667).

Like Loyalty League meetings, it was held on the second floor of the building occupied by the Company's plant (X 3862, 3872; I 39–40, 309, VIII 2666, IX 3033, 3067).

The organizational meeting of the plant union was planned and organized by, and was under the complete control of the Company's representatives (X 3875). Employees, while at work, were notified by their instructors to attend—the instructors having in turn been notified by the Company's telephone operator or by Mrs. Wherry, factory manager (III 1011, 1095–1096, 1108, IX 3344, 3435)—and the meeting was attended by supervisory employees, accompanied by the non-supervisory employees under them (X 3872; I 328c–328d, 354c–354d, II 378ee, 704g, V 1364e, 1374d, VIII 2692, 2911–2913, 2995, IX 3276, 3309–3312, 3315–3316, 3397–3399, 3430–3434, 3467, 3470, X 3551, 3619–3621, 3667). Chairs for the meeting were rented in the name of, and paid for by, the Loyalty League (X 3872; I 345, 349, III 963, V 1621).

Todd presided at the meeting (X 3872; I 328g, III 821). Her opening remarks indicated that she regarded the meeting as par of the series which has preceded it, for she stated that she hoped "this meeting is going to be as enthusiastic as the last one was" (the March 18 meeting), and explained that she had called the meeting "as chairman of the Committee of Employees" (X 3872–3873, III 821). She stated that she had consulted two lawyers whom she had known

for years and that they advised forming a plant union (X 3873; III 822). Todd indicated that she knew the question was in everyone's mind as to why the Loyalty League would not suffice, but that it would not (X 3873; III 822), that a union would have to be formed if they were successfully to resist attempts of organization by an outside union (X 3873; III 822–823). She then told employees that the new organization would be called the "Donnelly Garment Workers' Union," that although she was as distressed as they were at having to use the word "union", it seemed to be necessary (X 3873; III 822).

After listening to Todd's speech and a talk by Attorney Tyler, who had been invited to address the meeting, the employees, without any discussion, voted unanimously to form the D. G. W. U. (X 3873–3874; III 822–826). Before the meeting adjourned, about 1,300 charter membership cards previously prepared were distributed, signed, and collected; by-laws previously prepared, were adopted without alteration; and a general chairman, Todd, and eight group chairmen were nominated by a committee appointed by Todd and were unanimously elected to serve as officers and representatives (X 3874–3875; I 80b–80c, 176–177, 328h–330, III 826–830, X 3553, 3667). The purpose of the organization as stated in its by-laws was, *inter alia,* "the protection of employees and members of this Union from coercion, intimidation, violence or threats of violence,

in order to force them to join unions organized and dominated by outsiders not employees in this plant" (X 3874; III 798f).

Through the membership and activities of supervisory employees, the Company continued its control and direction of the D. G. W. U. (X 3878). In addition to Todd, the general chairman, other supervisory employees including instructors and thread girls, Heath Cowan, head of the receiving department, Marvin Price, adviser on mechanical matters and in charge of maintenance of factory building and equipment, and Ortense Root, head of the sample department, all of whom the Board found to be representatives of management (see *supra*, pp. 23–33), regularly attended, notified employees under them to attend, and took an active part in subsequent meetings of the D. G. W. U. (X 3875–3877; I 99, 131, 136, II 421, 424–424b, 428–429, 510, III 743–763, 830, 854, 865–866, 868–870, 875–882, 887, 891–894, 897–900, 909–911, 1003–1005, 1007, 1011, V 1349–1350, VII 2175, 2255–2257, VIII 2671–2672, 2676–2677, 2680, 2689, 2733, 2911–2912, 2914, 2949–2953, 2961–2962, IX 3157, 3316, 3426–3427, 3435–3436, 3445–3446, 3450, X 3644, 3649–3650, 3671, 3673, 3675).[14] Thus, at

[14] In addition, Dewey Atchison, production engineer (X 3876; II 715–716, 718d–718e, III 1032, 1091), Ted Scoles, head of the cutting department (X 3877; I 136, II 424), Lena Tyhurst, head of the inspection department and in charge of the quality of work (X 3877; II 424a, 428–429, III 1007, VII 2175, VIII 2961–2962, IX 3157, 3435, X 3673), and Mrs. Bogart, head of the dividing department

the 1938 election of officers, five thread girls nominated or seconded the nomination of two nominating committees and both committees were unanimously elected (X 3876; III 875–876, 1003–1004, VIII 2680, 2689, 2733, 2911–2912, 2949). The two committees brought in identical recommendations for the primary offices of chairman, secretary, treasurer and also for the representative of the mechanics (X 3877; III 879). Moreover, upon the election of the nominees, which was by standing vote, Todd called upon two instructors to give their opinions as to which slate received the larger vote (X 3877; III 881–882, 1003–1005, VIII 2953). Todd was the candidate for chairman on both slates (X 3877; III 879). The election in 1939 repeated in many respects the occurrences of the previous year; however, this time Todd herself appointed the two nominating committees without going through the device of nomination and unanimous selection as in the 1938 election (X 3877; III 897–898, 899–900). These two nominating committees each brought in slates naming Todd as chairman and the same employees as treasurer, secretary, and representative of the mechanics (X 3877; III 909–910). Again the election was by an open standing vote (X 3877; III 911).

(X 3877; II 424a, III 1003, V 1349–1350, VII 2255–2257, IX 3445–3446), although not shown to have been active, were members of the D. G. W. U. (X 3877; III 743, 753, 755).

Although upon several occasions employees questioned the right of some of these representatives of management to be members of or to attend and participate in meetings of the D. G. W. U., and expressed the view that the presence of such persons at meetings precluded the employees from speaking freely of their complaints, Todd assured them that all employees except the executives of the Company and the head of the personnel department were properly eligible for membership and might participate in the activities of the D. G. W. U. (X 3877–3878; III 926–927, IX 3320–3324, 3411–3413, X 3554).

2. *The D. G. W. U. procedure for setting piece-work rates.*—Soon after the D. G. W. U. was organized, the group chairmen, who composed its executive committee, appointed a committee to represent the D. G. W. U. in adjusting piece-work rates with the Company (X 3881; III 923). Some 600 to 800 of the Company's 1,300 employees were paid on a piece-work basis so that the procedure by which piece-work rates were fixed was concededly "the most important thing the individual operators have to bargain for with the Company" (X 3881; I 114, II 490, VII 2173, 2186). When a new style of garment was designed, a separate piece-work rate was set for each separate operation to be performed on the garment, i. e., so many cents being paid for each dozen shoulder seams stitched, so many cents for each dozen pockets set in, etc. (V 1374f–1375).

The piece-work committee appointed consisted of Mrs. Lulu Nichols, Josephine Spalito, and Rose Todd (X 3881; III 923). Mrs. Nichols, a supervisory employee, and Miss Spalito, her assistant, were both employed by the Company for the purpose of establishing for the Company the piece-work prices to be paid its employees (X 3881; II 417–418, 718f, III 1007, 1109, V 1374–1375, VII 2144–2148, 2158, 2234–2239, 2400). Mrs. Nichols was described by Employment Manager Hyde as an "executive" of the Company (X 3881; III 1109), and she admittedly had final authority in setting piece-work rates on behalf of the Company (X 3881; I 114, VII 2114, 2158, 2234–2239, 2400). Thus, the same persons who set the rates on behalf of the Company in the first instance, were also representatives of the D. G. W. U. for the purpose of protesting and negotiating with regard to those rates (X 3881).

3. *The closed-shop, check-off and wage agreements.*—On May 6, 1937, Todd and the D. G. W. U. group chairmen informed Mrs. Reed that they would want a contract concerning hours, wages, and working conditions "which up to now have been satisfactory," and that they would like a closed shop (X 3878; III 913). Mrs. Reed replied, "I understand that is very essential to industrial peace" (X 3878; III 913). The D. G. W. U. then expressed a desire to pay part of the salary of Rose Todd, a substantial amount of whose working time, it was contemplated, would

be spent on D. G. W. U. business, and Mrs. Reed, acquiescing, told Todd, "I do not feel at the present time that you need to give all of your time to the union" (X 3878; III 913). In fact, as we have shown, (*supra*, p. 31), the Company continued to pay all of Todd's regular salary and the amount paid her by the D. G. W. U. was in addition.

Thereafter, in a single day, May 27, 1937, a contract providing for a closed shop was presented by the D. G. W. U. to the Company, was modified at the suggestion of the Company to include, *inter alia*, a provision that no employee should serve on the bargaining committee of the D. G. W. U. unless he had been in the employ of the Company for at least a year, and was agreed upon and signed by the parties (X 3879; I 84–86, 89–90, 198, III 807–811, 918–922, VII 2095–2098, 2104–2105, 2376, 2378–2379). In June, after the I. L. G. W. U. had publicly announced its intention to obtain a minimum weekly wage of $16.00, Todd recommended to the group chairmen, and they decided, that in order to improve upon the I. L. G. W. U.'s accomplishment, the D. G. W. U. should demand a minimum of $16.50 for piecework operators (X 3880; I 118, III 929). The Company granted this demand and entered into a supplemental wage agreement with the D. G. W. U. on June 22 (X 3879–3880; II 462, III 812–821, VII 2110–2112, 2379–2386). In August or September 1937, the Company granted the

D. G. W. U.'s request for a check-off of monthly dues of 25 cents and each employee thereafter signed a card prepared by the Company authorizing such check-off (X 3880; I 224, 226–227, 233–234, 259, 262, 274a–274b, III 799, VII 2112–2113, 2387–2388). The D. G. W. U. issued no receipts, kept no record of individual dues payments and had no means of knowing what individuals paid dues in the past months (X 3880; I 266–271, 292a, II 704g–704i). Nor were the general chairman and the treasurer of the D. G. W. U. able to state at the hearing what proportion of each month an employee must work to entitle the D. G. W. U. to collect his dues from the Company (X 3880; I 271, II 704i). The original closed-shop agreement, the supplemental wage agreement, and the check-off agreement continued in effect without change up to the date of the hearing before the Board (X 3880; I 126–127, 271, 277–278, III 947–948, VII 2112, A 389).

4. *Further financial and other support by the Company.*—The Company, in various other ways, lent financial and other support to the D. G. W. U. It permitted not only the organizational meeting, but the succeeding three or four other membership meetings to be held during working hours (X 3882; IX 3314–3315, 3410–3411, 3414 3434, 3449, 3450, 3458, X 3669–3670). Thereafter, although regular monthly meetings of the general membership were held after working hours and on the employees' own time, they con-

tinued to be held on the second and later on the first floor of the building in which the plant is located. (X 3882; I 129–130, IX 3228). Prior to May 10, 1937, the D. G. W. U. obtained the permission of the landlord to use the second floor as a meeting place and pay no rent therefor (X 3882; I 129–130).[15] After May 10, 1937, the D. G. W. U. continued to meet on the second floor until the Company remodeled a portion of the first floor to serve as an auditorium which then became the meeting place (X 3882; I 130–131, II 380–381, III 877, 939, 943). Although the D. G. W. U. met on the second floor monthly from May 1937 on, it was not until November 1937 that the question of paying rent was raised. (X 3882; II 378cc–378dd, III 939, 943). The first rental payment was made in April 1938 and consisted of $3.00 per meeting held during the past year (X 3882; II 378cc–378dd). It is plain that

[15] Although the first and second floors were not leased by the Company prior to May 1937 (I 129–130, II 380–381), employees had regularly attended Loyalty League meetings and Company style shows held on these floors and did not know whether or not they were leased by the Company (VII 2354–2358, VIII 2666, 2897, IX 3033, 3067, 3229). This free use of the property can only be explained by the assumption that the landlord regarded the activities of the D. G. W. U. as a part of the Company's business activities—a gratuity which the tenant would expect to be accorded as a corollary to its lease. The grant by the landlord to the D. G. W. U. would clearly never have been given if it had not been sought by the Company's supervisors, as it was (I 129–130), and desired by the Company.

prior to November 1937, rent-free use of the Company's premises was contemplated: Todd, the general chairman, twice announced at meetings that use of the Company's facilities was entirely proper (X 3882; III 835, 853).

Meetings of the group chairmen who composed the executive committee of the D. G. W. U., prior to May 1938, were held in the office of Mrs. Spilsbury, head of the designing department (X 3882–3883; I 131, 136, III 928), and thereafter in the auditorium on the first floor (X 3883; III 946). No rental was ever paid for such use of this property (X 3883; II 378cc–378dd, III 877–912, Tr. 4989–5030, 5000, 5024).

Both the general meetings of the D. G. W. U. and the meetings of the group chairmen were called through use of the Company's facilities, either by use of its interdepartmental telephone system, or by sending a so-called I. D. M. (interdepartmental memorandum) to each department of the plant through the Company's regular messenger service (X 3883; I 128a–129, II 378ee, 704g, V 1364e, 1374d, VIII 2897, IX 3152–3153, 3276, 3397–3399, 3434, X 3558). Announcement of a meeting over the Company's plant telephone system was accomplished by Todd's notifying the telephone operator to call each department. Each section had a telephone and it was the duty of the instructor or thread girl to answer the telephone and convey any message that might be given either to the employees generally, if it was

a general meeting, or to the specific employee in question if it was a group chairmen meeting (X 3883; V 1374d, VIII 2968, IX 3434, 3452, 3467–3468, 3474, X 3558). The interdepartmental telephones were not available for use by the employees generally, but could only be used for calls by supervisory employees pertaining to Company business (X 3883; IX 3342, X 3672). In addition, Todd called meetings of employees generally or of the group chairmen, by preparing a notice on the Company's I. D. M. paper which was sent to each section of the plant via the Company's messenger service (X 3883; I 128a–129, VIII 2897, IX 3152–3153, 3480, X 3558, 3671). Upon the arrival of an I. D. M. in any section, it was the duty of the instructor or thread girl to read the I. D. M. and pass it to the girls in the section (X 3883; I 128a–129, IX 3152–3153, 3342, X 3487, 3558, 3671, 3672, 3759).

Todd also utilized the I. D. M. system for collecting assessments and sending instructions pertaining to D. G. W. U. business to members (X 3883; III 869, 900, 936). The D. G. W. U. received its mail at the plant through Company messengers and frequently used the plant bulletin boards (X 3884; I 128–129, 264–265, VIII 2580).

Piece-work operators who served as group chairmen or officers were paid by the Company for time lost from work while attending to

D. G. W. U. business (X 3884; IX 3427–3429, 3447–3449, 3466–3467, X 3603–3604, 3606–3609 3618). Time workers were allowed to take time from their work with no deductions in pay (X 3884; I 127–128, 166, Tr. 6942).

At a meeting on May 11, 1937, Todd announced that "our work will be conducted" at a desk on the ninth floor of the plant and that she could be reached on Union business at "any time necessary" (X 3884; III 830, 833, 835). Todd's desk was the D. G. W. U.'s only offices; its records were kept there in a file belonging to the Company (X 3884; I 35–36) and Union business was regularly transacted by employees who went there for that purpose (X 3884–3885; I 133, III 831, 869–870). Thus, the check-off cards heretofore referred to, which were printed and distributed by the Company, were signed and turned in at this desk over a two-week period by employees who came there from all over the plant (X 3885; I 262–263). Membership cards of those who were absent from the April 27 meeting were signed and left at this desk (X 3885; Tr. 451). When Todd left on her vacation in December 1937, she informed the group chairmen that a substitute would be at her desk from 11:00 a. m. to 12:45 each day—much longer than the usual half-hour lunch period—to transact D. G. W. U. business (X 3885; III 941, IX 3393).

Grievances were reported to Todd during the working day and she attended to them on Company time (X 3885; Tr. 611–612). She also collected money for the D. G. W. U. on Company time and directed the D. G. W. U. representatives to do the same (X 3885; III 869).

Membership cards were mimeographed after working hours on a machine owned by the Company (X 3885; I 59–60, 62–62a, 262). Copies of by-laws were produced on a ditto machine belonging to the Company (X 3885; I 62). The D. G. W. U. owns no typewriter and the secretary of the D. G. W. U. has often used a typewriter owned by the Company for typing the minutes of the meetings of the D. G. W. U. and of the group chairmen (X 3885; I 107–108).

5. *The Board's conclusions regarding the D. G. W. U.*—Either the Board's findings regarding Todd's supervisory or confidential status (*supra*, pp. 28–32), or its findings respecting the instructors' or thread girls' status as foremen and assistant foremen (*supra*, pp. 23–28), in and of themselves would necessitate the finding that the Company dominated the formation and administration of the D. G. W. U. Todd's role in the formation and administration of the D. G. W. U. (*supra*, pp. 53–58, 59–66), was such that, assuming her supervisory or confidential status, there can be no doubt of the correctness of the Board's finding that through her the Company dominated

the formation of the D. G. W. U. and thereafter retained Company control of that organization (X 3886). Similarly, the membership and activities in the D. G. W. U. of the instructors and thread girls (*supra*, pp. 53–58) were such that, assuming their status as foremen and assistant foremen, there can be no doubt of the correctness of the Board's finding that their "presence inevitably prevents the organization from being free of the [Company] domination" (X 3886). Their role in the nomination and election of the executive committee in 1938 (*supra*, p. 57), itself spelled domination.

Quite apart from the role of Todd and the instructors and thread girls in the D. G. W. U., the composition of its committee for the adjustment of piece-work rates itself constituted fundamental and unmistakeable domination of the D. G. W. U., as the Board found (X 3887). As shown (*supra*, pp. 58–59), this committee, the most important of all the D. G. W. U. committees, was composed entirely of management representatives, two of whom had as their sole duty the job of establishing piece-work rates on behalf of the Company. The result was, as the Board noted (X 3887), that the Company "sits on both sides of the bargaining table and the aggrieved operators are left without any independent collective bargaining with regard to piece-work rates,

ordinarily a matter jealously guarded for the promotion of the employees."[16]

The House Committee Report on the bill which became the Act, in explaining the purpose of Section 8 (2) of the Act, stated that "collective bargaining is reduced to a sham when the employer sits on both sides of the table" (H. Rep. No. 1147, 74th Cong., 1st Sess., p. 18). It is, of course, immaterial, when the employee organization is dominated by the employer, as here, that the employees may feel that they are acting freely in having a representative of management serve as their bargaining agent. The Act does not permit such a course of conduct. *National Labor Relations*

[16] For descriptions of the manner in which bona fide unions bargain respecting piece rates, see The Twentieth Century Fund, *Trends in Collective Bargaining* (1945), pp. 74–75; Sumner H. Slichter, *Union Policies and Industrial Management* (1941), pp. 341–344; C. Lawrence Christenson, *Collective Bargaining in Chicago: 1929–1930* (1933), pp. 341–345; Morris Greenberg, *How to Operate Under a Collective Agreement*, Society for the Advancement of Management Journal, Vol. III, No. 1 (January, 1938), p. 8; National Industrial Conference Board, Studies in Personnel Policy No. 19, *Some Problems in Wage Incentive Administration* (1940), pp. 15–16; John R. Commons, *Trade Unionism and Labor Problems* (2nd series, 1921), pp. 215–217; Wilfred Carsel, *A History of the Chicago Ladies' Garment Workers' Union* (1940), p. 247; International Ladies' Garment Workers' Union, *Report of the General Executive Board to the Twenty-fifth Convention, 1944*, pp. 50–53; Spencer Miller, Jr., *Labor's Attitude Toward Time and Motion Study*, Mechanical Engineering, Vol. 60, No. 4 (April 1938), p. 289, 290–291; Harold B. Bergen, *Problems of Scientific Management in Unionized Plants*, Mechanical Engineering, Vol. 60, No. 3 (March 1938), p. 235, 237–238.

Board v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 267–268; *National Labor Relations Board* v. *H. E. Fletcher Co.*, 108 F. 2d 459, 465–466 (C. C. A. 1), certiorari denied, 309 U. S. 678; *National Labor Relations Board* v. *Griswold Mfg. Co.*, 106 F. 2d 713, 721 (C. C. A. 3); *Virginia Ferry Corp.* v. *National Labor Relations Board*, 101 F. 2d 103, 105 (C. C. A. 4); *American Enka Corp. v. National Labor Relations Board*, 119 F. 2d 60, 62–63 (C. C. A. 4); *National Labor Relations Board* v. *Rath Packing Company*, 115 F. 2d 217 (C. C. A. 8).

Moreover, all the circumstances accompanying the organization and functioning of the D. G. W. U. compel the conclusion that it is a Company-dominated organization. Prior to the enactment of the Act and thereafter until the Act was held constitutional, the Company had made it clear to its employees that it was opposed to the I. L. G. W. U., and that membership therein was an act of serious disloyalty to Mrs. Reed (*supra*, pp. 33–53). When the Act was declared constitutional, Todd and Atherton, officers of the anti-I. L. G. W. U. Loyalty League and the whole supervisory staff found that a union was necessary, though distasteful (*supra*, pp. 53–55). At the same meeting at which the subject of organizing a union was first presented to the employees, the D. G. W. U. was organized, officers elected, by-laws adopted and approximately 1,300 employees enrolled as members (*supra*, pp. 55–56).

The use of the Loyalty League bank account in borrowing money, hiring an attorney, and renting chairs serve to make abundantly clear the similarity of the role played by the D. G. W. U. to that played by the Loyalty League; the conformity to the accustomed procedures of the Loyalty League as to the method of calling a meeting, place of meeting, and time (*supra*, pp. 37–40, 44–45, 53–54, 61–65), point unmistakably in the same direction and were useful means of taking advantage of the employees' accustomed subservience to the employer's desire to place the employees in a strait-jacket with respect to labor matters. No employee confronted with the situation presented at the April 27 meeting could have felt free to refuse to join the D. G. W. U. The hasty grant of the closed-shop and check-off (*supra*, pp. 59–61), prevented the escape of any employees thereafter from the pattern of anti-I. L. G. W. U. employment relations dictated by the Company. Cf. *Virginia Electric and Power Co.* v. *National Labor Relations Board*, 319 U. S. 533.

In addition, the grant of extensive use of the Company's facilities, of pay for time spent during working hours on D. G. W. U. business, as well as the membership of the instructors, thread girls and other representatives of management in the D. G. W. U. (*supra*, pp. 53–54, 56–57, 59, 61–66), constituted such substantial support by the Company of the D. G. W. U. as to compel the Board's conclusion that such labor organization

existed in contravention of Section 8 (2) of the Act."

The grant by the Company of a closed-shop contract to the D. G. W. U. under the circumstances was, as the Board found (X 388), a violation of Section 8 (3) of the Act, for it constituted discrimination in regard to a condition of employment to encourage membership in a labor organization as proscribed by that Section. All employees of the Company, as a condition of their employment, were compelled to join the D. G. W. U. The Company in thus forcing D. G. W. U. membership upon its employees was not protected by the proviso to Section 8 (3) of the Act which protects closed shop contracts with legitimate labor organizations which have been selected by a majority of the employees in an appropriate bargaining unit, for the proviso exempts from its protection any labor organization "established, maintained, or assisted" in violation of Section 8 (2) of the Act.

E. THE BOARD'S ORDER IS VALID AND PROPER

The Board's order required the Company to cease and desist from dominating, interfering with, or contributing support to the D. G. W. U. or any other labor organization; from giving effect to any contract with the D. G. W. U.; from dis-

[11] Under the compelling facts of this case, the testimony of employees that they joined and formed the D. G. W. U. of their own free will was properly accorded no weight by the Board (See discussion *infra*, pp. 73-82).

couraging membership in the I. L. G. W. U. or any other labor organization; from using the Loyalty League to interfere with, restrain, and coerce its employees; and from in any other manner interfering with, restraining, or coercing its employees (X 3896-3897). As affirmative action which would remedy the Company's unfair labor practices, the Board ordered the Company to withdraw recognition from and completely disestablish the D. G. W. U.; to reimburse its former and present employees for all dues and assessments which it has deducted from their wages on behalf of the D. G. W. U.; and to post appropriate notices (X 3897).

These are the usual and uniformly approved remedies for unfair labor practices such as those found by the Board in this case. Aside from their challenge to the Board's findings of unfair labor practices, neither the Company nor the D. G. W. U. in their briefs in the court below challenged any portion of the order except that requiring reimbursement of checked-off dues and assessments. The validity of such an order requiring reimbursement of dues checked off under a closed-shop agreement with a company-dominated union has heretofore been approved by this Court in *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, 539–545, and is no longer open to question.

II

THE COURT BELOW ERRED IN HOLDING THAT THE COMPANY AND THE D. G. W. U. WERE DEPRIVED OF DUE PROCESS BY THE BOARD'S TREATMENT OF CONCLUSIONARY TESTIMONY RECEIVED PURSUANT TO THE COURT'S REMAND ORDER

As stated *supra*, p. 9, the court below, in its first decision, held that the Board had denied the Company and the D. G. W. U. due process by excluding the testimony of employees, in accordance with offers of proof, that they formed and joined the D. G. W. U. of their own free will and did not know of any interference with, domination or support of the D. G. W. U. by the Company. The offers of proof were very comprehensive, including not only conclusionary testimony to that effect but also cumulative testimony as to how and why employees had formed or joined the D. G. W. U. (III 743–763, 765–795). At the hearing on remand the Board received, as we have shown, the testimony which the court held had been wrongfully excluded (*supra*, p. 10).

The court below in its second decision, from which this appeal is taken, held that although the Board had received the evidence referred to in its first decision as having been wrongfully excluded, the conclusionary testimony of employees that they formed and joined the D. G. W. U. of their own free will and were not influenced,

interfered with or coerced by the Company "received no different or greater consideration upon the second hearing than it did upon the first, and that it was disregarded in both hearings" (XIII 44).

The court accordingly concluded that the Board had again denied due process to the Company and the D. G. W. U. (XIII 52).

A. THE PROPRIETY OF THE BOARD'S TREATMENT OF THE CONCLUSIONARY TESTIMONY

It is submitted that the Board's treatment of the evidence under consideration was entirely proper. As mentioned, *supra*, pp. 11–12, the Board stated in its decision that it had "carefully considered all such evidence" but found that it did "not overcome more positive evidence in the record that the [Company] committed acts of interference and assistance in the formation and administration of the D. G. W. U. which subjected that organization to the [Company's] domination and which removed from the employees selection of the D. G. W. U. the complete freedom of choice which the Act contemplates" (A 619). It found, under the circumstances of this case, that such testimony was "totally unpersuasive that the employees voluntarily designated the D. G. W. U." and expressed the view, moreover, that it was "impelled to adhere to the opinion, derived from [its] experience in administration of the Act, that conclusionary evidence of this

nature is immaterial to issues such as those presented in this case" (A 619).

We submit that the Board's treatment of the testimony in question was entirely proper for several reasons. Under the circumstances of this case, the organization, structure, and Company support of the D. G. W. U. were such as to ensure Company domination. As shown *supra*, pp. 33–71, the Company, after demonstrating strong opposition to the organization of its employees by the I. L. G. W. U., formed an organization called the Loyalty League whose primary purpose was the frustration of efforts of the I. L. G. W. U. to organize its employees, and thereafter, through the Loyalty League and its supervisory employees, set up and took a leading part in the administration of a labor organization called the D. G. W. U., participated in determining the structure of the bargaining committee, controlled the piece-work committee through membership of its supervisory employees on that committee, granted the D. G. W. U. a closed-shop contract, agreed to a checkoff of dues for that labor organization, and otherwise contributed financial and other support to it. The evidence of Company domination and support was thus so strong and conclusive that the Board was compelled to find a violation of Section 8 (2) of the Act. No introspective testimony of an employee that he in fact was not coerced could overcome the necessary conclusion to be drawn from the Company's

overt acts. Under similar facts, the Court of Appeals for the District of Columbia in *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. 2d 641, 653, held that employee testimony, excluded by the trial examiner, as to whether the employees were conscious of being influenced, restrained, interfered with, coerced or dominated by their employer "would have been irrelevant."

Moreover, even assuming *arguendo*, that the facts described *supra*, pp. 33–71, would not "ensure Company dominance and violate the Act" (*Bethlehem Steel Co.* v. *National Labor Relations Board, supra*, 120 F. 2d at 653)—that a different inference might be possible—the conclusionary testimony of the employees that they joined the D. G. W. U. of their own free will and were not influenced, interfered with, or coerced by the Company is so introspective and unreliable in character that the Board should not be required to accord it greater weight than the more demonstrable contrary evidence, or, indeed, to receive such evidence at all. Thus the Board was correct both in holding that the conclusionary testimony was outweighed, and that, while it had been considered, it was immaterial (A. 619.). This is so partly because employees who have been subjected to their employer's illegal interference cannot separate in their own minds those beliefs which have been instilled by their employer's unfair conduct from those which they formed or might have

formed independently of such conduct. Hence, an employee may believe that he has not been coerced, and so testify, when in fact he has been coerced. The domination, interference, and restraint of the employer having economic power over him through a long period of years, as here, necessarily colors the employee's point of view. And even if the employee realizes that he has been influenced or coerced by his employer's coercive conduct, he may not feel free so to express himself while testifying in the presence of his employer or its representatives (compare II 613, 718b–718c, VII 2065–2066, VIII 2621).[18]

This Court, in *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 588, recognized the futility of any attempt by the Board to "probe the precise factors of motivation which underlay each employee's choice" of a bargaining representative, and pointed out that "normally the conclusion that their choice was re-

[18] It is well recognized that employer-conducted polls as to the preference of employees for a bargaining representative cannot be considered indicative of the free and uncoerced choice of the employees. *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 76, affirming 110 F. 2d 29, 36 (App. D. C.); *National Labor Relations Board* v. *New Era Die Co.*, 118 F. 2d 500, 503–504 (C. C. A. 3); *Titan Metal Mfg. Co.* v. *National Labor Relations Board*, 106 F. 2d 254, 260 (C. C. A. 3), certiorari denied, 308 U. S. 615; *National Labor Relations Board* v. *Rock Hill Printing & Finishing Co.*, 131 F. 2d 171, 172–173 (C. C. A. 4); *Shell Oil Co.* v. *National Labor Relations Board*, 128 F. 2d 206–207 (C. C. A. 5); *National Labor Relations Board* v. *Colten*, 105 F. 2d 179, 181–182 (C. C. A. 6).

strained by the employer's interference must of necessity be based on the existence of conditions or circumstances which the employer created or for which he was fairly responsible and as a result of which it may reasonably be inferred that the employees did not have that complete and unfettered freedom of choice which the Act contemplates." This necessity of weighing the employer's conduct in each case, and determining from the nature of the conduct, rather than from the minds of the employees, whether the conduct has been in contravention of the Act, has been recognized by the courts in many situations. Indeed, it has become almost axiomatic that where employer conduct is of a kind which tends to interfere with or coerce employees in their rights guaranteed by Section 7 of the Act, the Board does not need to prove that such conduct actually had the effect of interfering with or coercing the employees involved.[19]

[19] *See National Labor Relations Board* v. *John Englehorn & Sons*, 134 F. 2d 553, 557 (C. C. A. 3); *National Labor Relations Board* v. *A. S. Abell Co.*, 97 F. 2d 951, 955–956 (C. C. A. 4); *Humble Oil & Refining Co.* v. *National Labor Relations Board*, 113 F. 2d 85, 92 (C. C. A. 5); *National Labor Relations Board* v. *American Mfg. Co.*, 132 F. 2d 740, 742 (C. C. A. 5); *National Labor Relations Board* v. *Aintree Corp.*, 132 F. 2d 469, 472 (C. C. A. 7), certiorari denied, 318 U. S. 774; *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 814 (C. C. A. 7); *Elastic Stop Nut Corp.* v. *National Labor Relations Board*, 142 F. 2d 371 (C. C. A. 8), certiorari denied, 323 U. S. 722; *National Labor Relations Board* v. *Crown Can Co.*, 138 F. 2d 263 (C. C. A. 8), certiorari denied, 321 U. S. 769.

The Circuit Court of Appeals for the Seventh Circuit, in *Western Cartridge Co.* v. *National Labor Relations Board*, 134 F. 2d 240, 244–245, certiorari denied, 320 U. S. 746, aptly summarizes the reasons for refusing to accord weight to conclusionary testimony similar to that here involved, as follows:

> Uncontradicted testimony of a large number of employees to the effect that they were free from coercion and under no sense of constraint cannot avail the Independent, *Bethlehem, etc.* v. *N. L. R. B.*, 1 Cir., 114 F. (2d) 930, 937, and *American Enka Corp.* v. *N. L. R. B.*, 4 Cir., 119 F. (2d) 60, 62. and a showing of non-coercion in one instance does not disprove an affirmative showing of coercion in another instance, *United States* v. *General Motors Corp.*, 7 Cir., 121 F. (2d) 376, 405. The recognition of constraint calls for a high degree of introspective perception, *Bethlehem Shipbuilding* case, *supra*, 114 F. (2d) 937, and it would be a rare case where the finders of fact could probe the precise factors of motivation underlying each employee's choice. Normally, the conclusion that the employees' choice was restrained by the employer's interference must of necessity be based on the existence of conditions or circumstances which the employer created or for which he was fairly responsible, and as a result of which it may reasonably be inferred that the employees did not have that complete and unfettered freedom of choice which the Act

contemplates, *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 588, 61 S. Ct. 358, 85 L. Ed. 368.[20]

Moreover, the conclusion of a witness as to whether conduct of the employer has coerced him or any other employee, like many types of lay opinion evidence, should be excluded in the interest of judicial and administrative efficiency. "A showing of non-coercion in one instance does not disprove an affirmative showing of coercion in another instance." *Western Cartridge Co.* v. *Na-*

[20] For similar rulings of other circuit courts of appeals, see *National Labor Relations Board* v. *Brown Paper Mill Co.*, 108 F. 2d 867, 870, 871 (C. C. A. 5), certiorari denied, 310 U. S. 651; *Bethlehem Shipbuilding Corp.* v. *National Labor Relations Board*, 114 F. 2d 930, 937 (C. C. A. 1), certiorari dismissed, 312 U. S. 710; *American Enka Corp.* v. *National Labor Relations Board*, 119 F. 2d 60, 62 (C. C. A. 4). But cf. *National Labor Relations Board* v. *Swank Products, Inc.*, 108 F. 2d 872, 875 (C. C. A. 3).

Compare also *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, reversing 101 F. 2d 841, 847 (C. C. A. 4), and *National Labor Relations Board* v. *Automotive Maintenance Machinery Co.*, 315 U. S. 282, reversing 116 F. 2d 350, 355-356 (C. C. A. 7), in which this Court reversed the circuit courts of appeals which had set aside Board orders of disestablishment on the ground that the employees desired to be represented by the labor organization which the Board found to be company dominated. Cf. *National Labor Relations Board* v. *New Era Die Co.*, 118 F. 2d 500, 505 (C. C. A. 3), wherein the court upheld the Board in its refusal to permit the employer, who had refused to bargain with an accredited bargaining representative, to show by the testimony of his employees, who had revoked their authorizations of such representative, that they had done so voluntarily. This testimony the court held was "properly rejected as immaterial."

tional Labor Relations Board, 134 F. 2d 240, 244–245 (C. C. A. 7), certiorari denied, 320 U. S. 746; cf. *National Labor Relations Board* v. *Trojan Powder Co.*, 135 F. 2d 337, 339 (C. C. A. 3), certiorari denied, 320 U. S. 768; *United States* v. *General Motors Corp.*, 121 F. 2d 376, 405 (C. C. A. 7), certiorari denied, 314 U. S. 618. In this case, 32 employees testified that they were not coerced and the Company offered to prove that the remaining approximately 1,200 employees would have testified to the same effect (*supra*, pp. 6–7, 19). The Board on the other hand called several of the employees listed in the offer of proof who testified that employees were coerced (IX 3471, X 3497–3498, 3523–3528, 3552–3554, 3612, 3665–3670, 3691–3693–3703). If the Board is required to receive this testimony, it will be unable to limit those who testify on this question to any number short of the total number of employees. And if such testimony must be admitted, "an undue burden will be placed on the adversary to develop the facts on cross-examination." Note, *Evidence Problems in N. L. R. B. Hearings and the Applicability of the Proposed Code of Evidence* (1942), 55 Harv. L. Rev. 820, 826. Many months might be thus consumed in examining and cross-examining all the witnesses whom the Company might offer for this type of testimony. Unless such voluminous testimony could be of substantial value in deciding the issue involved, the necessary time and expense consumed would be

wasted and the hearing of many unfair labor practice cases would be so delayed as to make largely ineffectual the Act's remedial provisions. Compare Section 10 (i), Appendix, *infra*, p. 110. In short, the Board is well within the bounds of an administrative discretion informed by experience when it excludes conclusionary testimony of the type here involved. Evidence of this sort is of too little probative value to outweigh the burdens attendant upon its admission.

In any event, the Company was not here prejudiced by the treatment which the Board accorded this testimony. As this Court, in *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U. S. 146, 163, pointed out, where evidence "would be of slight probative value" the Board might properly say "that accepting the offers of proof it would not alter the determination" of the question before the Board. Compare also the attitude of the Circuit Court of Appeals for the Tenth Circuit in *Wilson & Co., Inc.* v. *National Labor Relations Board*, decided July 8, 1946, 18 L. R. R. M. 2198, 2200, toward background evidence rejected by the trial examiner as immaterial. The court said: "If this evidence were admitted and considered, it would not change the result here. Therefore, it is unnecessary to pass upon its admissibility."

B. THE PROPRIETY OF THE BOARD'S RETENTION OF THE SAME TRIAL EXAMINER TO PRESIDE AT THE HEARING ON REMAND

In holding that the trial examiner was disqualified to sit at the hearing on remand merely

because, at the first hearing, he had expressed his opinion that the conclusionary testimony above discussed was immaterial (XIII 38–40, 51), the court below was clearly wrong. In the first place, if the Board is correct in its view that, under the facts of this case, such testimony is without probative force, then the court's ruling relative to the trial examiner must fall for that reason alone. But in any event, there was no more reason for disqualifying the trial examiner from presiding at the hearing on remand than there would be for disqualifying a judge who has ruled erroneously upon the materiality of evidence from hearing the same case on remand. It is well settled that a judge is not disqualified from presiding at a hearing because of his previous erroneous rulings in the case. *Ex parte American Steel Barrel Co.*, 230 U. S. 35; *Berger* v. *United States*, 255 U. S. 22, 23–24. The same doctrine applies to administrative proceedings. *United States* v. *Morgan*, 313 U. S. 409, 421.

Indeed, there is even less reason for disqualifying the trial examiner than there is for the disqualification of the judge in such circumstances. The trial examiner has no power to decide the case; he may only make recommendations to the Board. Section 10 (c) of the Act; *National Labor Relations Board* v. *Air Associates, Inc.*, 121 F. 2d 586, 588–590 (C. C. A. 2); *National Labor Relations Board* v. *Weirton Steel Co.*, 135 F. 2d 494, 496 (C. C. A. 3); *National Labor Relations*

Board v. *Botany Worsted Mills*, 133 F. 2d 876, 882 (C. C. A. 3), certiorari denied, 319 U. S. 751; *Consumers Power Co.* v. *National Labor Relations Board*, 113 F. 2d 38, 43 (C. C. A. 6). The Board may accept some or all of his recommendations or may reject all. In this case it accepted most, but not all of his recommendations. It expressly and independently ruled upon the weight and materiality of the evidence which the court below directed it to consider upon the remand. In short, it was the Board, not the trial examiner, who decided the case.

No better presiding officer could have been chosen than the examiner who conducted the initial proceedings. He was especially well qualified, for he was familiar with the company's operations, the names and identity of the persons involved, and the voluminous record at the previous hearing, which was a part of the entire record to be considered after the hearing on remand. He had observed the demeanor of the witnesses who testified at the first hearing and was therefore well qualified to decide the credibility of their testimony. Moreover, the trial examiner was familiar with the issues involved and the reason why the second hearing was being conducted. He was, accordingly, the logical person to be selected to preside at the second hearing.

III

THE COMPANY AND THE D. G. W. U. WERE NOT DEPRIVED OF DUE PROCESS BY REASON OF THE BOARD'S LIMITATION OF EVIDENCE AT THE HEARING ON REMAND TO THOSE MATTERS MENTIONED BY THE COURT BELOW AS HAVING BEEN ERRONEOUSLY EXCLUDED AT THE FIRST HEARING

In its first decision (123 F. 2d 215), the court below did not direct that there be a hearing *de novo* as to all issues presented by the pleadings, but only that the Company and the D. G. W. U. be afforded "an opportunity to introduce all of the competent and material evidence *which was rejected by the Trial Examiner*" (italics supplied) (*id.* at 225). The mandate remanded the case to the Board "for further proceedings not inconsistent with the opinion of [the] court."[20a] The hearing on remand was therefore only a supplemental hearing and the trial examiner, whose action was approved by the Board in its decision (A 618), limited it rather strictly to the receipt of evidence which the court below had held was erroneously rejected at the first hearing (VII 2508–2519, VIII 2542–2564, 2788, IX 3276–3308). The only exception which he made to this limitation was in the case of Mrs. Reed, the Company's president, who had been unable to testify at the first hearing because of illness (VII 2064–2065, 2077–2092, 2151–2156). The hearing on remand

[20a] The mandate is unprinted but is on file with the Clerk of this Court.

was conducted upon the same complaint and answer without any amendment, and no new issues were therefore presented by the pleadings.

The court below nevertheless ruled that the Company and the D. G. W. U. were denied due process by the trial examiner's refusal to receive certain evidence at the hearing on remand which the court deemed material but which it had not found was improperly rejected at the first hearing (XIII 46-51). This evidence falls into the following categories: (1) evidence not within the scope of the remand order by reason of the fact that it had not been rejected at the first hearing; (2) evidence rejected by the trial examiner at the first hearing as well as at the hearing on remand, the exclusion of which was not mentioned in the court's first opinion; and (3) evidence rejected at both hearings, the exclusion of which was approved by the court in its first opinion. The propriety of the Board's rejection of each of these categories will be discussed separately.

A. EVIDENCE NOT REJECTED AT FIRST HEARING

The evidence included in the first category—evidence which was either not offered or which was offered and received at the first hearing—related to (1) whether employees at other plants having duties similar to those of the supervisory employees who were active in the formation and administration of the D. G. W. U. were eligible to membership in the I. L. G. W. U., and (2)

whether certain union members discharged or laid off prior to the passage of the Act were discharged or laid off because of their union membership or activities.

1. *Eligibility of supervisors to union membership.*—No evidence was offered at the first hearing regarding the eligibility of any employees to membership in the I. L. G. W. U. At the hearing on remand, the trial examiner at first permitted counsel for the Company to call to the witness stand and question an official of the I. L. G. W. U. respecting the eligibility of instructors to membership in that union (VII 2507, VIII 2523–2527). When she testified that they were ineligible and counsel for the Company indicated that he intended to prove that they were eligible by showing numerous instances of their admission (VIII 2523–2527, 2529–2533, 2537–2540, 2543), the trial examiner struck all testimony he had received on that issue and refused to receive further evidence for the reason that it was not within the scope of the remand order and for the additional reason that it was immaterial to any issue in the case (VII 2508–2510, VIII 2559–2564, 2788, IX 3257, X 3787–3799).

Since such evidence was not offered at the first hearing, it could not fall within the purview of that evidence which the court below directed the Board to receive upon remand, that is, the "competent and material evidence which was rejected by the Trial Examiner" at the first hearing. The

trial examiner made it clear at the hearing on remand—and we think properly so—that with the exception of testimony of Mrs. Reed, the Company's president, who was precluded on account of illness from testifying at the first hearing, he did not intend to receive any evidence except that mentioned in the opinion of the court below as having been improperly excluded by him at the first hearing (VIII 2596–2598, 2639–2641, 2786–2788–2791, 2802–2803, 2808–2809, IX 3182, 3259–3266, 3277–3288, 3307–3308, 3330–3334, 3439–3445, 3646–3649). Neither the Company nor the D. G. W. U. alleged that evidence regarding eligibility of supervisors to membership in the I. L. G. W. U. was newly discovered or unavailable at the first hearing nor offered any explanation for their failure to offer such evidence at that time. As this and other courts have recognized, "the proper administration of justice demands that there be an end to litigation. It demands that parties shall not present their causes of action or their defenses piecemeal." *Sorensen* v. *Pyrate Corp.*, 65 F. 2d 982, 985 (C. C. A. 9). Accord: *Roberts* v. *Cooper*, 20 How. 467, 481; *United States Trust Co.* v. *New Mexico*, 183 U. S. 535, 537, 540.

However, aside from the propriety of the trial examiner's exclusion of the evidence in question because it was not within the scope of the remand order, it was properly excluded because it was of only remote relevance to the issues of this case, which were whether the Company had engaged in unfair labor practices in violation of Section 8

(1), (2), and (3) of the Act. This Court has held that the membership of alleged supervisory employees in a nationally-affiliated union does not require the Board to disregard other evidence in the record tending to show employer responsibility for the acts and statements of those employees. *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 81. And in situations similar to that present in this case, the Circuit Court of Appeals for the Seventh Circuit has twice held that eligibility of supervisors to membership in an affiliated labor organization does not preclude the Board from finding the employer responsible for participation by such supervisors in the formation and administration of an unaffiliated labor organization. *New Idea, Inc.* v. *National Labor Relations Board*, 117 F. 2d 517, 524 (C. C. A. 7); *National Labor Relations Board* v. *Aintree Corp.*, 132 F. 2d 469, 472 (C. C. A. 7), certiorari denied, 318 U. S. 774. Similarly, it has been recognized that ineligibility of a supervisor to membership in an affiliated union is not a condition precedent to employer responsibility for his labor relations activities involving violations of sections of the Act other than Section 8 (2). See *National Labor Relations Board* v. *John & Ollier Engraving Co.*, 123 F. 2d 589, 593 (C. C. A. 7); *National Labor Relations Board* v. *Christian Board of Publication*, 113 F. 2d 678, 682 (C. C. A. 8); *National*

Labor Relations Board v. *Pacific Gas & Electric Co.*, 118 F. 2d 780, 788 (C. C. A. 9).

Thus while these cases do not hold that evidence as to the eligibility to membership of alleged supervisory employees in nationally-affiliated unions is irrelevant to the issue of their supervisory status, they do serve to show that membership or eligibility to membership is by no means controlling. This being so, we believe it clear that, under the circumstances of this case, the proffered testimony could have been and was properly excluded on grounds of remoteness. The direct evidence in the record to show the supervisory status of the instructors was overwhelming (see *supra*, pp. 23–28); the testimony on this issue, introduced by both the Board and the Company was voluminous (see record references cited *supra*, pp. 23–28); and the Company's offers of proof on this issue related to employees holding allegedly comparable positions in plants other than the Donnelly plant (X 3788–3791) and, indeed, to some extent, in plants outside Kansas City (X 3791–3795). It was within the trial examiner's discretion, under the circumstances, to exclude the tendered evidence. Cf. *Newman* v. *Clayton F. Summy Co.*, 133 F. 2d 465, 466–467 (C. C. A. 2).

2. *Pre-Act discharges and lay-offs.*—Other evidence not included within the scope of the remand order, the exclusion of which at the hearing on remand was held by the court below to constitute a denial of due process, related to whether or not certain employees discharged or laid off prior to

the passage of the Act were discriminatorily discharged or laid off (XIII 47–48). During the first hearing, excerpts from the transcript of a hearing before the National Industrial Recovery Board which tried charges that the Company had discriminatorily discharged or laid off certain employees and also excerpts from the transcript of a hearing in an injunction suit before Federal District Judge Miller (*infra*, pp. 98–99) were introduced in evidence pursuant to a stipulation of the parties, and all other evidence offered by the Company to show that the discharges and lay-offs were nondiscriminatory was received (I 44a, 273, II 389–390c, 394–395, 399–401, 539, 550a, 707; III 728–729, 740–741, 1032–1055, 1057–1059, 1061–1090, 1096–1108, IV 1112cc–1112dd, 1119–1120w, 1120z–1129, 1130d–1160, 1276a, 1276g–1276m, 1316–1336, V 1368a–1374c, 1617–1619, Tr. 1891, 1964, 1967–1968, 1978, 2815): This matter not being within the scope of the remand order, the trial examiner, during the hearing on remand, refused to receive any further testimony with reference to it (VIII 2639, X 3783, 3792–3793), except the testimony of Mrs. Reed, the Company's president, who by reason of illness had been unable to testify at the first hearing (VII 2064–2065, 2069–2074, 2148–2151). In its decision, the Board expressly stated that it made no finding whether the discharges and lay-offs were, in fact, discriminatory (X 3860, n. 25). It used the evidence, along with evidence of the Company's pre-Act

hostility to the I. L. G. W. U., merely to show a background in which employees became hesitant to join, admit membership in, or discuss the I. L. G. W. U. (X 3860–3861, 3863–3864).

The Company raised no question in regard to this evidence either before the Board or the court below prior to the hearing on remand other than an objection that it was immaterial and that some of it was hearsay (I 44a, III 1110a–1110c, V 1368). It has never alleged that any additional evidence which it may have on that subject is newly discovered or was unavailable at the first hearing.

B. EVIDENCE REJECTED AT FIRST HEARING BUT NOT MENTIONED IN FIRST OPINION OF COURT BELOW

The trial examiner, at the first hearing as well as at the hearing on remand, refused to receive evidence relating to whether the contract made by the Company with the D. G. W. U. contained provisions as beneficial to the employees as contracts made by other employers with the I. L. G. W. U. (I 201–207, 217, 238b–238c, II 378hh–380, VI 1653–1676, 1920, 1922, 1929–1930, VII 2507–2520, VIII 2521–2522, IX 3257, X 3789). In its answer to the complaint, the Company had alleged that its contract with the D. G. W. U. "provides for higher wages and more favorable conditions of employment than are contained in any contract which the" I. L. G. W. U. "has entered into with other garment manufacturers in this part of the country" (A 389–390). In refusing to receive the I. L. G. W. U. con-

tracts during the first hearing, the trial examiner stated that so many factors entered into the wage rates and conditions of employment reflected in other contracts as to render any comparison useless without an investigation into all those other factors, and, furthermore, that he believed it material to show only how the terms of the D. G. W. U. contract were arrived at—whether or not by true collective bargaining—and not whether the terms were better or worse than those in other contracts (I 202–207, 238b–238c, II 378hh–380, VI 1920–1922, 1929–1930, 1985–1987).

Although the Company argued in its brief before the court below prior to the remand that it had been denied due process by the Board's refusal to receive the I. L. G. W. U. contracts, the court made no mention of the admissibility of such contracts in remanding the case to the Board. When the issue arose during the hearing on remand (VII 2507–2520), the trial examiner rejected a new offer of proof respecting the contracts (X 3789), ruling such evidence beyond the scope of the remand and also immaterial (IX 3257), but stating that he would receive testimony of any employee that she knew of such contracts and that her dissatisfaction with their terms led her to prefer the D. G. W. U. (VII 2514–2518, VIII 2521). He did receive such testimony (VIII 2593–2594, 2929–2931, IX 3080).

Although we recognize "that a judgment of reversal is not necessarily an adjudication by the

appellate court of any other than the questions in terms discussed and decided" (*Mutual Life Insurance Co.* v. *Hill*, 193 U. S. 551, 553–554), we believe that a reasonable interpretation of the first decision of the court below (123 F. 2d 215) warrants the conclusion that the court considered and rejected as without merit the Company's contention that it had been prejudiced by the trial examiner's exclusion of the testimony in question. Since the Company had complained of the trial examiner's rejection of evidence on numerous subjects, and the court below expressly considered and ruled upon the materiality of evidence on several of the subjects when remanding the case for a supplemental hearing for the purpose of receiving "all the competent and material evidence which was rejected by the Trial Examiner" (123 F. 2d at 225) at the first hearing, there was nothing in the court's opinion which could have put the examiner on notice that any rejected evidence not mentioned in the opinion was considered by the court as competent and material. There still remain numerous rulings of the examiner on the admissibility of evidence, urged by the Company as prejudicial error in the court below, which have not been expressly passed upon by the court below in either its first or second opinion. Assuming *arguendo* that the examiner had committed various prejudicial errors, is it reasonable to assume that the court below would permit successive remands for the purpose of re-

ceiving only one type of admissible evidence at each remanded hearing, when one remand should suffice?

However, regardless of whether such evidence be considered within the scope of the remand order, we believe that its rejection was proper on the ground that it was immaterial to any issue in the case. The court below, in finding the exclusion of evidence regarding the contracts to be prejudicial error, apparently assumed that the Board found the substantive provisions of the contracts between the Company and the D. G. W. U. to be a "sham" (XIII 48–49). However, the Board made no such finding. It clearly considered the testimony regarding the D. G. W. U. contracts relevant only to show that there was no collective bargaining with respect to the provisions, to show that the provision placing a limitation upon the qualification to membership on the D. G. W. U.'s bargaining committee was included at the request of the Company, and to show, by the closed-shop and check-off provisions, an attempt by the Company to perpetuate its illegally constituted instrumentality for excluding bona fide labor organizations (*supra*, pp. 58–61, 70–71). As the Court of Appeals for the District of Columbia said in *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. 2d 641, 651 (App. D. C.), when confronted with a like argument by the employer, "these agreements were irrelevant" and neither the other employers nor

the agreements which they made nor the charging union were "on trial." Had the Company, in the instant case, unilaterally posted a statement of policy setting forth wages and working conditions, the existence of bona fide I. L. G. W. U. contracts, containing similar terms, would not even have tended to refute the fact that the statement of policy was not arrived at through collective bargaining. That is equally true here where the so-called contract was the product of "negotiations" at which the employer sat on both sides of the bargaining table. In any event, this evidence, like that as to the eligibility of alleged supervisory employees to I. L. G. W. U. membership, was so remote as to make its exclusion a matter for the discretion of the trier of the facts. See *supra*, pp. 87–90.

C. EVIDENCE THE REJECTION OF WHICH WAS APPROVED IN THE FIRST OPINION OF THE COURT BELOW.

The third category of evidence, the rejection of which at the hearing on remand was found by the court below to deprive the Company and the D. G. W. U. of due process, related to misconduct of the I. L. G. W. U., the union which had filed charges in this case (XIII 44–50). The rejection of this evidence had been expressly approved by the court below in its first opinion (123 F. 2d 215, 225).

The evidence regarding misconduct of the I. L. G. W. U. was offered in support of allegations made in the Company's answer to the

Board's complaint, in which it was alleged that the I. L. G. W. U. was engaged in a conspiracy to force the Company, by fraud and violence, to sign a closed-shop agreement with the I. L. G. W. U. (A 387–394). At the first hearing, although the Company and the D. G. W. U. had sought to introduce evidence that the I. L. G. W. U. had engaged in acts of violence at plants other than the Company's for the purpose of showing that the I. L. G. W. U. was attempting to use the Board's processes to injure the Company and for the purpose of showing the employees' reasons for forming or joining the D. G. W. U., the trial examiner ruled that the I. L. G. W. U. was not on trial and refused to receive testimony concerning violence by the I. L. G. W. U. unless the witness had personally encountered violence or had been personally threatened with violence (I 4, 190, 219–223, 334k–334l, 344q–344v, 366–367, II 553, 614, 627, 660–661, 700–703, 705, 718y, 718bb, 718aa, Tr. 69, 111, 114, 118, 2046–2047, 2468, 2583). The Company filed an offer of proof (II 704p, III 742d, IV 1156b–1306, V 1409–1619) which the trial examiner rejected (VI 1752). Although, in its first opinion, the court below upheld the trial examiner's refusal to "try" the I. L. G. W. U. "for alleged conspiracy" (123 F. 2d 215, 225), at the hearing on remand, the trial examiner nevertheless received all evidence offered through Mrs. Reed as to all she knew of any

violence or threatened violence by the I. L. G. W. U. (VII 2077–2092, 2151–2156), as well as all evidence offered as to what the employees had seen, read, or heard regarding such violence by the I. L. G. W. U. which had occurred within a reasonable period prior to the formation of the D. G. W. U.—such evidence being considered relevant to show the employees' reasons for forming or joining the D. G. W. U. (VIII 2566–2568, 2624–2626, 2711–2713, 2768–2771, 2788, 2848–2851, 2915–2917, 3003–3006, 3046–3049, 3078–3081, 3120–3121, 3169–3171, 4102–4103, 4125–4169, 4173–4175). The reasonable period was fixed at six months at the suggestion of counsel for the Company. (VIII 2788, 2805–2809). The trial examiner considered irrelevant and refused to receive evidence as to whether any of the alleged violence at other plants actually occurred (VII 2512–2513, VIII 2540–2542, 2554–2555). There was no offer at either of the two hearings to show any fraud or violence at the Company's plant. It is this evidence of misconduct against other employers which the court below, in its second opinion, ruled material (XIII 44–50).

In that opinion, the court held that such evidence was relevant for the Board to consider (1) in determining whether charges were filed by the I. L. G. W. U. in good faith or for the purpose of influencing an injunction suit brought by the Company against the I. L. G. W. U. in a Federal District Court to prevent the I. L. G. W. U.

from carrying out threats to use violence in organizing the Company's plant (XIII 45–46),[21] and (2) in determining the reason why employees joined the Loyalty League and the D. G. W. U. (XIII 46–50).

The reversal by the court below of its position on the materiality of this evidence is apparently due to the interpretation it put (XIII 45) upon this Court's decision in *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, which was handed down subsequent to the first opinion in the instant case. During the progress of the hearing before the Board of the *Indiana & Michigan* case and at various times prior to the Board's decision, severe damage was done to the properties of the employer for which several prominent union leaders were subsequently indicted and convicted. Several of these leaders

[21] See *Donnelly Garment Co.* v. *International Ladies' Garment Workers' Union*, 20 F. Supp. 767 (W. D. Mo.), affirmed, 21 F. Supp. 807 (W. D. Mo.), reversed, 304 U. S. 243; 23 F. Supp. 998 (W. D. Mo.); 99 F. 2d 309 (C. C. A. 8), certiorari denied, 305 U. S. 662; 119 F. 2d 892 (C. C. A. 8); 121 F. 2d 561 (C. C. A. 8); 47 F. Supp. 61 (W. D. Mo.); *Donnelly Garment Co.* v. *Dubinsky*, 47 F. Supp. 65 (W. D. Mo.); *Donnelly Garment Co.* v. *International Ladies' Garment Workers' Union*, 47 F. Supp. 67 (W. D. Mo.); 55 F. Supp. 572 (W. D. Mo.); *Donnelly Garment Co.* v. *Dubinsky*, 55 F. Supp. 587 (W. D. Mo.); *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.*, 147 F. 2d 246 (C. C. A. 8), certiorari denied, 325 U. S. 852; *Donnelly Garment Co.* v. *Dubinsky*, 154 F. 2d 38 (C. C. A. 8). These cases mark the history of the Company's unsuccessful attempts to enjoin the I. L. G. W. U.

had been witnesses at the hearing before the Board. The employer sought to adduce additional evidence before the Board to show an unlawful conspiracy among the union leaders to intimidate and coerce the employer into settling the case then in the process of being heard and decided, and into recognizing the union as bargaining representative of its employees. The employer alleged that the unlawful destruction of its property was pursuant to the conspiracy thus to coerce and intimidate the employer in the defense of its case before the Board. This Court held that, under the circumstances, the unlawful conduct of the union leaders was material to a consideration of the weight and credibility of the testimony of these leaders as well as of the witnesses closely associated with them. It also held that, under the circumstances, the Board might wish to consider whether it should permit its processes to be taken advantage of by unions or by union leaders to advance their illegal purposes.

In the case at bar, there was no offer to prove that any of the witnesses had been convicted of any unlawful conduct against the Company or any other employer. And since none of the alleged unlawful conduct of union leaders in the case at bar occurred during or immediately preceding the hearing and other proceedings before the Board, it could not have been designed to intimidate the Company in the defense of its

case before the Board as was allegedly true in the *Indiana & Michigan* case. The court below appears (XIII 46) to have felt that the excluded evidence of misconduct was admissible for the purpose of showing that the charges filed by the I. L. G. W. U. were designed to influence the result of the action for an injunction mentioned *supra*, pp. 98–99, but that is immaterial here where the Board was concerned only with determining whether the Company had engaged in unfair labor practices and with insuring to all parties a fair hearing on such issues. The Board issues a complaint only after its investigation shows that there is merit to the charges, and the motive of the I. L. G. W. U. in filing the charges cannot deprive the Board of jurisdiction to proceed. *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 18; *National Labor Relations Board* v. *Brown Paper Mill Co.*, 108 F. 2d 867, 872 (C. C. A. 5), certiorari denied, 310 U. S. 651; *National Labor Relations Board* v. *Fickett-Brown Mfg. Co., Inc.*, 140 F. 2d 883, 884 (C. C. A. 5).

It is true, as this Court pointed out in the *Indiana & Michigan* case (318 U. S. at p. 19), that the Board might, in its discretion, withhold or dismiss its complaint "if it should appear that the charge was so related to a course of violence and destruction, carried on for the purpose of coercing an employer to help herd its employees

into the complaining union, as to constitute an abuse of the Board's process." But no offer was made to show any violence or destruction or any other kind of misconduct at the Company's plant, and the Board does not feel that threats made by a union to call a strike—even a strike accompanied by violence upon the picket lines as was allegedly true at strike-bound plants in Kansas City—should bar it from issuing a complaint upon charges filed by the union making such threats. In the *Indiana & Michigan* case, this Court itself said that "the Board is not required to sidetrack proceedings involving an employer's violation of the labor law while it explores irrelevant derelictions of parties or witnesses or acts of unknown or irresponsible persons." 318 U. S. at 28.

As stated, *supra*, pp. 97–98, the trial examiner admitted in evidence all testimony of Mrs. Reed and of employees as to what they had seen; read, or heard regarding violence upon the picket lines at other plants where the I. L. G. W. U. had called strikes—the evidence of the employees being considered relevant to show their reasons for joining the I. L. G. W. U.—but he considered irrelevant and refused to receive other evidence as to whether such violence actually occurred. Taking cognizance of the Company's contentions relative to the alleged threats, the Board stated

in its decision that "It may be true, as the [Company] contends, that many of them [the employees] feared the alleged threats of the I. L. G. W. U. but instead of permitting the employees to decide for themselves what attitudes they would adopt with regard to the I. L. G. W. U., the [Company] seized upon such fears as may have existed to build up and strengthen a militant employee opposition toward that labor organization" (X 3868–3869).

As Judge Woodrough pointed out in his dissenting opinion in this case, "the inquiry demanded in the proposed fields of controversy would only protract and distract. It could not illuminate. Employers may not commit the unfair labor practices such as charged in this case to prevent union electioneering even by labor unions that have a bad record behind them". (XIII 63). To require the Board to sidetrack the functions expressly delegated to it under the Act for the purpose of inquiring into alleged unlawful conduct of the charging union in situations such as those present in this case, would not only permit employers who have violated the Act to do so free of the sanctions of the Act whenever the organization filing the charge has been guilty of misconduct, but would greatly hamper the work of the Board by diverting its inquiries to collateral

matters rather than to the merits of the unfair labor practice charges.

An inquiry by the Board into such collateral matters would, moreover, be inconsistent with this Court's admonition that "The Board acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by * * * protecting the 'exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, * * *'." *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 362; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 193. The I. L. G. W. U., because it filed charges, did not "become the actor in the proceeding." *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 265. This function rested with the Board as the agency delegated by Congress to protect the public interest in suppressing unfair labor practices.

IV

THE BOARD'S ORDER SHOULD BE ENFORCED BY THIS COURT

As we have shown, *supra*, pp. 21–72, the Board's findings are supported by substantial evidence and its order is in all respects proper. Neither the Board's treatment of the evidence received nor

its rejection of other evidence constituted prejudicial error or a denial of due process. See *supra*, pp. 73–104. The court below erred, therefore, in refusing to enforce the Board's order.[22]

This case has four times been argued before the court below over a period of more than four years.[23] Three opinions have been issued by that

[22] Even if due process was not accorded, we believe that the court below nevertheless erred in setting aside and refusing to enforce the Board's order rather than remanding the case to the Board for the correction of such prejudicial errors as had been committed.

[23] On November 7, 1940, after oral argument on applications of the company and the D. G. W. U. for leave to adduce (1) evidence to show that they had been denied due process because of bias and prejudice on the part of the Board and its subordinates and collusion by them with the I. L. G. W. U., and (2) evidence going to the merits of the case, which had been excluded by the trial examiner and which they contended was competent and material, the court below handed down its opinion (7 L. R. R. M. 560), one judge dissenting, holding that the showing made by the Company and the D. G. W. U. as to the alleged bias and collusion was insufficient to invoke any action of the court, and denying the applications in that regard. It also denied the applications to adduce the excluded evidence allegedly going to the merits of the case, but did so without prejudice to a renewal of such applications when the case should be finally submitted to the court (see 123 F. 2d 215, 219–220). On May 21, 1941, oral argument was had on all issues except that which had been decided in the court's opinion of November 7, 1940. Thereafter, pursuant to a letter from Presiding Judge Archibald K. Gardner, dated July 24, 1941, requesting additional briefs on the bias and

court but it has not yet passed upon the substantiality of the evidence supporting the Board's findings (7 L. R. R. M. 560; 123 F. 2d 215; XIII 7–64). "This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require." *Watts, Watts & Co.* v. *Unione Austrica Etc.*, 248 U. S. 9, 21. And this Court has, in other Labor Board cases, passed on the substantiality of the supporting evidence even though the circuit court of appeals had not done so. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 29, reversing, 83 F. 2d 998 (C. C. A. 5); *National Labor Relations Board* v. *Fruehauf Trailer Co.*, 301 U. S. 49, 57, reversing 85 F. 2d 391 (C. C. A. 6). To avoid further delay in a case which has been before the Board and the courts for more than seven years (A 369), we respectfully request that, in addition to reversing the court below on the due process issues presented, this Court pass on the sufficiency of the evidence and enforce the Board's order *in toto*.

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collusion question decided by the court on November 7, 1940, the parties filed additional briefs and re-argued that question before the court on September 6, 1941. The case was again argued before the court below just prior to its decision of October 29, 1945 (XIII 6).

CONCLUSION

The decree of the court below should be reversed, and the cause remanded with directions to enforce the order of the Board in full.

Respectfully submitted.

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SEPTEMBER 1946.

APPENDIX

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*):

* * * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, main-

tained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SECTION 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including

reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

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(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

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(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

U. S. GOVERNMENT PRINTING OFFICE: 1946